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No.99-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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168 pp

QUESTION PRESENTED

Should the Court resolve the existing conflict among the circuits regarding the issue left open by the Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), namely, the admiralty law test for an abandonment of property long-lost at sea?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Columbus-America Discovery Group, Inc. and the respondents Atlantic Mutual Insurance Company; Insurance Company of North America; Salvage Association; London Assurance Company, Ltd.; Royal Exchange Assurance; Indemnity Marine Assurance Company, Ltd.; Marine Insurance Company, Ltd.; and the Superintendent of Insurance of the State of New York.

The respondents before this Court include Insurance Company of North America; Salvage Association; London Assurance; Alliance Assurance Company, Ltd; Royal Exchange Assurance; Indemnity Marine Assurance Company, Ltd.; Marine Insurance Company, Ltd.; and the Superintendent of Insurance of the State of New York.

Pursuant to Supreme Court Rule 29.1, petitioner avers that it does not have any parent companies or any subsidiaries that are not wholly-owned.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated February 8, 2000 is reported at 203 F.3d 291 and reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States Court of Appeals for the Fourth Circuit, dated August 26, 1992 is reported at 974 F.2d 450 and is reproduced at Pet. App. 30a. The opinion of the United States District Court for the Eastern District of Virginia, dated August 14, 1990, is reported at 742 F. Supp. 1327 and is

reproduced at Pet. App. 45a. The Order of the United States Court of Appeals for the Fourth Circuit, dated October 15, 1992, denying rehearing and denying rehearing *en banc*, and is reproduced at Pet. App. 148a. The Order of the United States Court of Appeals for the Fourth Circuit, dated March 7, 2000, denying rehearing and denying rehearing *en banc*, is reproduced at Pet. App. 142a.

JURISDICTION

The judgment of the court of appeals was entered on February 8. Pet. App. 1a. The court of appeals denied a timely Petition for Rehearing on March 13, 2000. Pet. App. 142a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction...."

STATEMENT OF THE CASE

This case presents the issue left open by the Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the maritime law standard for abandonment.

This is an admiralty action brought to adjudicate rights in the celebrated "ship of gold," a story told in the *New York Times* best-seller *Ship of Gold in the Deep Blue Sea*, as well as the forthcoming Warner Brothers motion picture *Ship of Gold*. See G. Kinder, *Ship of Gold in the Deep Blue Sea* (1998). Petitioner Columbus-America Discovery Group ("Columbus-America")

discovered the gold-laden shipwreck 130 years after it sank to the bottom of the Atlantic Ocean in a famous maritime disaster. The district court awarded petitioner legal right to the treasure, finding that it had been abandoned. The court of appeals reversed, awarding title to numerous insurance companies that allegedly had insured the lost gold in 1857, but had taken no steps in the intervening century to retrieve it. Over a strong dissent, the court of appeals held that Columbus-America was not entitled to ownership of the gold it retrieved from the sea, but was relegated to seeking compensation under the law of salvage. The full court of appeals split 7 to 5 in denying rehearing *en banc*, and the Court declined Columbus-America's petition for certiorari on an interlocutory basis. The case proceeded on remand with the application of salvage law, which produced a final judgment embodied in the February 8 Opinion of the Court of Appeals (the "Opinion"). The Opinion recognizes the conflict among the circuits on the standard for abandonment, but declines to overturn the 1992 panel opinion on the grounds that the panel lacks the power to overturn a prior panel opinion, in the absence of authorization from a higher authority.

This is the case of the famous shipwreck S.S. CENTRAL AMERICA. *See generally* Pet. App. 89a-90a; Pet. App. 38a-41a. The wooden-hulled, three-masted, luxury sidewheel steamer began its fateful voyage on September 3, 1857. The ship carried approximately 600 passengers from California and many tons of gold coins, bars, and dust produced during the gold rush and its entrepreneurial aftermath. In those days, prior to the completion of the intercontinental railroad, swiftest passage from the west coast to the east was by steamer from San Francisco to Panama, by rail across the isthmus, then on from the port of Aspinwall to New York by way of Havana. The CENTRAL AMERICA plied the last leg of this route, and is said to have carried one third of all the gold shipped during her era from

California to the east.[1]

The CENTRAL AMERICA's passenger manifest listed numerous notables, prospectors, and speculators, many of whom had found their fortunes in the gold fields. Others, including California Judge Alonzo Castle Monson, who had lost his house and all his money in a memorable poker game, were less fortunate. All aboard were headed into history. Soon after leaving Havana, the ship sailed straight into the teeth of a tropical hurricane. The commander, crew, and passengers fought heroically for three days and nights, finally bailing water for thirty hours without rest. Despite their efforts, the ship went down on the night of September 12 in 8,000 feet of water, some 180 miles east of Charleston, South Carolina, where the Gulf Stream meets the Sargasso Sea.

Passing ships rescued 150 passengers (including all the women and children), but more than 400 persons perished in the sinking. Reports of the tragedy contain vivid accounts of miners flinging down hard-won sacks of gold in despair on realizing their imminent doom. Virtually all of the gold aboard was lost. The value of the gold on board—including both commercial shipments and gold belonging to individual passengers—was estimated in 1857 to be many millions of dollars. So great was the magnitude of the loss that some historians have recognized the event as a contributing cause of the Economic Panic of 1857. The court of appeals estimated the value of the treasure to be as much as $1 billion, Pet. App. 33a and Life Magazine has called it

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[1] Even before her epic sinking, the CENTRAL AMERICA had become notable in American history, transporting the first treaty between the United States and Japan, signed by Commodore Matthew Perry, and sailing under the command of William Lewis Herndon, whose exploration of the Amazon inspired Mark Twain.

the greatest treasure ever found. Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992, at 32.

The ship of gold remained a lost legend until six generations later, when it captured the imaginations of three friends from Columbus, Ohio. They formed Columbus-America Discovery Group, a team of engineers, historians, entrepreneurs, and scientists, to pursue their dream of finding, recovering, and restoring the shipwreck. The thirteen-year effort culminated in risky and extensive at-sea search operations, aided by innovative techniques employing probability analysis, search theory, side-scanning sonar, image processing, and robotics. *See* Pet. App. 157a (a sonar image of the type employed in the search). Columbus-America adapted and enhanced many of these technological innovations specifically for the project.[2] After a lengthy search, the years of effort culminated in the location of the shipwreck. Using their advanced deep-sea robot (named *Nemo*), Columbus-America began recovering and preserving artifacts from the ocean floor. *See* Pet. App. 99a, 157a. Since then, Columbus-America has not only recovered gold, *see* Pet. App. 158a, but also has devoted substantial resources to protecting the scientific, historic, and educational value of the shipwreck. Among other things, these efforts have led to the cataloguing of over 150 species of sea creatures on the shipwreck, 12 of which (including a new genus) were previously unknown; the creation of video laser discs on science and history for secondary schools;

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[2] The pioneering maritime search methods developed and used in the search for the CENTRAL AMERICA, as well as their significance for the future of maritime search and recovery, are discussed and diagrammed in a classic article published by the journal of the Institute of Management Sciences. *See* Stone, *Search for the* S.S. Central America: *Mathematical Treasure Hunting*, 22 Interfaces 32 (1992).

educational television specials on interactive open circuit television broadcasts from the discovery ship, as well as specials by the Discovery Channel and the History Channel; and over 800 free educational programs in schools, civic clubs, university classroom and public auditoriums.

Columbus-America's recovery effort is continuing, and will continue for many years into the future. Exploration has been completed on less than 10% of the shipwreck. The scientific experiments at the shipwreck site, the analysis of historical and scientific data already obtained, and the recovery of additional treasure and artifacts will go on for many years to come. As to the efforts to date, the courts have observed:

- "From the inception of the project, [Columbus-America] had assembled experts in the various fields of science, archeology, history, maritime, marketing and publicity, to advise and assist in the use, care and preservation of the shipwreck site. Selection of the personnel to assist was from those most highly qualified and experienced in the contemplated activities....The same criteria [were] used in selecting the experts who were to evaluate, handle, care for and preserve the artifacts, scientific materials, information and knowledge obtained from the operation, and to preserve and make it available for future use by the public in research and learning." *Columbus-America Discovery Group v. Atlantic Mutual, et al.*, Civ. A. No. 87-363-N, 1993 WL 580900, *9 (E.D. Va. Nov. 18, 1993), *aff'd*, 56 F.3d 556 (4th Cir.), *cert. denied*, 516 U.S. 398 (1995).

- "What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We

> can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination.... Its efforts provide a standard against which all others should be judged." *Columbus-America Discovery Group v. Atlantic Mutual, et al.*, 56 F.3d 556, 572, 576 (4th Cir.), *cert. denied*, 516 U.S. 938 (1995).

In 1987, Columbus-America commenced an admiralty action *in rem* in the United States District Court for the Eastern District of Virginia, seeking confirmation of title to the shipwreck. Columbus-America asserted that the shipwreck was abandoned. The district court exercised jurisdiction under 28 U.S.C. § 1333, the general grant of admiralty jurisdiction to the federal district courts. Pet. App.109a. During the next two years, Columbus-America continued its search and recovery operations, while at the same time fending off litigation from rival search groups. The district court issued injunctions protecting Columbus-America's search as it progressed, and prohibiting interference with Columbus-America's recovery efforts. Pet. App. 103a-104a.

Waiting until two years later, when in September 1989 Columbus-America publicly announced substantial gold recoveries, thirty-nine claimants, purporting to be 1857 insurers or their successors in interest, appeared. Pet. App. 105a. The companies asserted that they were the owners of the gold in the commercial shipments aboard the CENTRAL AMERICA by virtue of insurance claims they alleged to have paid upon its loss, and demanded possession of the treasure Columbus-America had found and recovered. *Id.*

After extensive discovery, the district court scheduled a trial for

April 1990. With the consent of the parties, the trial was bifurcated. Pet. App. 108a. The initial determination to be made by the district court was whether the facts showed that the CENTRAL AMERICA was abandoned. If the wreck was abandoned, Columbus-America would be entitled to sole possession under the admiralty law of abandonment and finds. If not, the insurance companies would be entitled to assert ownership under the law of salvage, with Columbus-America being relegated to compensation as a salvor. *Id.*

During the two-week trial, the district court heard the testimony of numerous witnesses and examined hundreds of exhibits. After considering further briefs and oral arguments, the district court rejected the claims of the insurance companies. Pet. App. 139a. Relying on authority on abandonment in the First, Fifth and Eleventh Circuits, the district court held that whether a wreck has been abandoned is a question of fact. Abandonment is a "'question of intent, which may be inferred from all of the relevant facts and circumstances.'" Pet. App. 111a. The district court noted that modern decisions have "'rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of *animus revertendi* (the owner has no intention of returning).'" Pet. App. 112a. While lapse of time and non-use "are not sufficient, in and of themselves, to constitute abandonment, under certain circumstances, they may give rise to an implication of intention to abandon." Pet. App. 114a . The district court rejected the insurance companies' position that abandonment requires an express, affirmative disclaimer of title, holding instead that abandonment may be inferred.

Based on the total facts and circumstances before it, the district court held that Columbus-America had established "by clear and convincing evidence that each of the insurance

companies long ago abandoned any claim, right, title or interest that they may have had in the gold aboard the CENTRAL AMERICA." Pet. App. 139a. In short, the district court rejected the position of the insurance companies—that no abandonment could be found because "they never signed any documents so stating, never made any public announcement of abandonment and have always claimed to own the gold." Pet. App. 134a.

A sharply divided Fourth Circuit panel reversed. The court of appeals rejected the line of authority inferring abandonment from the passage of time, non-use and the other facts and circumstances—holding that these precedents are applicable only where no purported previous owner appears. Pet. App. 53a. The court of appeals reasoned that while abandonment may be inferred where no claimant appears, the law is different where any party purporting to claim ownership is identified. In such a case, abandonment cannot be found unless the finder proves by "clear and convincing evidence" extraordinary facts: the only showing that the court of appeals said would satisfy its strict test was "an owner's express declaration abandoning title." *Id.* Pet. App. 52a.

Applying its test, the court of appeals proceeded to dismiss the district court's evaluation of the witnesses and evidence. Pet. App. 60a-66a. Since there was obviously no showing that the insurance companies had signed a formal document or made a public announcement disclaiming the gold, the court of appeals remanded for application of the law of salvage and a determination of what share of the treasure each insurer should receive.[3] In short, the Fourth Circuit held that (apart from the

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[3] Despite the fact it was undisputed that much of the gold aboard the shipwreck, including passenger gold, had been uninsured in 1857, and

unrealistic scenario of an express renunciation of treasure) there simply can be no finding of abandonment when a purported owner appears. Pet. App. 53a ("By contrast, parties who intend to assert a claim of ownership may be identified. In such a case the law of salvage is applied."). The majority decision therefore reversed the decision of the District Court, which had applied the "clear and convincing evidence" standard and had drawn an inference of abandonment based on the totality of facts and circumstances in the case.

Judge Widener dissented, criticizing the majority for "its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long-lost wreck; [and] in making factual findings as an appellate court." Pet. App. 74a-75a. Judge Widener canvassed the law governing abandonment to demonstrate that the majority's new requirement of express abandonment "cannot be reconciled" with the long line of maritime and common law authority establishing that abandonment may be inferred from all the surrounding facts and circumstances. Pet App. 76a-79a. The dissent also pointed out that the majority's refusal to allow the application of the law of finds to long-lost wrecks "breaks with the law of every other circuit that has decided the question." Pet.

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despite the presence of specific serial numbers on the bars and other identifying marks on the gold, the insurance companies stipulated that they could identify the insured items only generically as "gold bars, coins or dust." Under the express abandonment standard applied by the court of appeals, however, this presented no impediment to their recovery, since the test presumed that any gold recovered belonged to the insurance companies, in the absence of clear and convincing proof by Columbus-America of a negative—that the gold recovered had not been insured by the insurance companies. Pet. App. 60a. Columbus-America stipulated that it was unable to bear such a demanding burden of proof.

App. 88a. Judge Widener also observed that the majority opinion improperly substituted its own judgment for that of the district court, violating the Court's proscription of appellate fact-finding in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Pet. App. 74a, 88a.

The court of appeals split 7-5 in denying rehearing and rehearing *en banc*. Judge Hall, who had joined Judge Russell's majority opinion on the panel, voted against panel rehearing, but voted for consideration of the case by the full court *en banc*. Pet. App. 155a. Columbus-America filed a petition for writ of certiorari asking the Court to consider the issue of abandonment on an interlocutory basis. The insurance companies opposed certiorari, contending that the case would not be ripe for review on certiorari until a judgment had been rendered in the remanded salvage proceedings, and the Court denied Columbus-America's interlocutory petition without comment. Pet. App. 141a.

For the next six years, based on the premise of non-abandonment, the remanded salvage proceedings continued in the district court and the court of appeals. At each stage of the proceedings, Columbus-America preserved its objection that the treasure had been abandoned. In addition, Columbus-America participated as an *amicus curie* in other proceedings on abandonment, including *California v. Deep Sea Research, Inc.*, as well as cases in the Ninth and Sixth Circuits which each considered, and rejected, the Fourth Circuit's express abandonment standard. The remanded proceedings ultimately resulted in a division of interests under salvage law, with 92.4% of the treasure awarded to Columbus-America and 7.6% to the insurance companies. Following these dispositions, in 1998, Columbus-America and the insurance companies entered into a conditional settlement agreement

solely as to the dispute between them, with the express term that the failure of any condition would render the agreement "null, void and of no effect." Pet. App. 11a. Initially, the district court entered the agreed dismissal between the parties, and the respective percentages of the treasure were placed in the custody of each party. Two weeks afterwards, however, the district court changed its position, amending the agreement, with the result of rendering it "null, void and of no effect." Pet. App. 12a, 19a, 22a.

Columbus-America appealed based on the need for resolution of circuit conflict on the standard for abandonment with respect to its future recoveries, as well as the failure of a material condition of the settlement agreement. The court of appeals agreed that the "district court's alteration of the agreed dismissal order had the effect of re-writing the Settlement Agreement by eliminating a term to which both parties had already agreed, namely that the Underwriters had no claim to any future salvage from the Central America." Pet. App. 19a. The court also agreed that this term had been a condition of the Settlement Agreement, Pet. App. 19a, and that under the precedents in the Fourth Circuit, *e.g. Wood v. Virginia Hauling Co.*, 528 F.2d 423, 426 (4th Cir. 1975), the district court's amendment required the court of appeals to fashion a remedy. Pet. App. 17a, 22a.

As to Columbus-America proposed remedy—clarification of the standard of abandonment for future recoveries, as well as an award of title to the entire treasure under the traditional standard for abandonment of admiralty law—the court of appeals held that it lacked power to act, absent resolution of the circuit conflict by higher authority. Rejecting the Underwriters' argument that the conditional settlement agreement had rendered abandonment moot, the Court

considered the issue at length and held that the circuits are clearly in conflict. Pet. App. 26a-29a. The court of appeals further held, however, that it was bound the 1992 split panel opinion requiring an express abandonment because of the absence of contrary instruction from either the court of appeals *en banc* or the Supreme Court. Observing that the *in rem* nature of the proceeding will require Columbus-America to bring its recoveries into court, and prove its title, on an on-going basis in the future, Pet. App. 20a-21a, the court of appeals held that its only power was to accept a second remedy for the amendment, the restoration of the conditional settlement agreement with assurances of maximum due process protections for Columbus-America. Pet. App. 28a, 29a. Therefore, the court of appeals held that it could not accept Columbus-America's proposed remedy:

> Our en banc court has declined to reexamine our panel holding in 974 F.2d 450 as to the proof necessary for abandonment, although two members of the panel favored reexamination. In such event, we do not believe that the circumstances exist for a panel to change the decision of the previous panel and that that subject is better addressed by an en banc court. Cf. Oman v. Johns Mansville Corp., 764 F.2d 224, 226-27 (4th Cir. 1983).

Pet. App. 28a. On March 13, 2000, the court of appeals denied Columbus-America's request that it grant a rehearing *en banc* to resolve the conflict among the circuits. Pet. App. 138a.

REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address a conflict among the circuits regarding the admiralty law standard for abandonment, left open in *California v. Deep Sea Research,*

Inc., 523 U.S. 491 (1998).[4] The existing circuit conflict has filled the once clear law of admiralty with chaos and complexity. It has nullified Congress' enactment in the Abandoned Shipwreck Act of 1987. It has blurred lines of state-federal jurisdiction over shipwrecks within U.S. territory. The conflict among the circuits has eroded the responsiveness of admiralty law to new and emerging technologies for maritime exploration. It has chilled ocean exploration aimed at carrying those emerging technologies into the future. It has spawned the assertion of stale claims and rampant forum shopping. Absent resolution by the Court, the insidious effects of the existing circuit conflict will continue into the foreseeable future.

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE ADMIRALTY LAW STANDARD FOR DETERMINING THE ABANDONMENT OF PROPERTY LONG-LOST AT SEA

Three different circuits, state courts and numerous legal scholars have recognized the fundamental conflict among the circuits regarding the standard for abandonment in admiralty law. The Opinion below recounts the conflict among the circuits:

> Columbus-America argues that we should adopt the dissenting opinion's abandonment test and overrule the

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[4] The Court has also adverted to the abandonment of shipwrecks in another case, but has not had occasion directly to address the issue. *See Florida Department of State v. Treasure Salvor, Inc.*, 458 U.S. 670, 677 & n.8 (1982) (Opinion of Stevens, J.) (discussing district court's application of *animus revertendi* doctrine and consequent vesting of ownership in sunken vessel's finder).

prior panel's judgment under exceptions to the law of the case doctrine. After examination of the cases cited by Columbus-America, we agree that the majority's abandonment test was rejected by two other courts of appeal, the Ninth Circuit in Deep Sea Research, Inc. v. The Brother Jonathan, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 118 S.Ct. 1464, 1473 (1998) and the Sixth Circuit in Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al., 105 F.3d 1078, 1084 (6th Cir. 1997), vacated and remanded on other grounds, 118 S. Ct. 1558 (1998). The Supreme Court, however, did not define abandonment when it reviewed Brother Jonathan. California Deep Sea Research, Inc., 118 S. Ct. 1464, 1473 (1993) (leaving the issue of whether the Brother Jonathan was abandoned under the Abandoned Shipwreck Act for reconsideration on remand). The Court either declined to or simply did not resolve the conflict between the Sixth, Ninth and Fourth Circuits regarding the test for abandonment and instead remanded "with the clarification that the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." California v. Deep Sea Research, Inc., 528 U.S. 591, 508 (1998).... The rule in the three circuits is not the same and the Supreme Court has not clarified the question as above quotation from Deep Sea Research (Brother Jonathan) indicates.

Pet. App. 26-28a.

The Ninth Circuit discussed the conflict among the circuits in *Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, *vacated in part on other grounds, and remanded sub nom. California*

v. Deep Sea Research, Inc., 523 U.S. 491 (1998). The court of appeals rejected the Fourth Circuit test, noting that "In holding that abandonment could only be found on the basis of an express renunciation of ownership, the Fourth Circuit introduced a significant modification into maritime law." 102 F.3d at 388 (citing *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting). The court of appeals found that, even though the court below had cited the Fourth Circuit opinion, it had instead followed the Ninth Circuit rule of inferred abandonment. *Id.*

On review of the Ninth Circuit decision following a grant of certiorari, the Court held that the Eleventh Amendment was not a bar to federal jurisdiction even if the *Brother Johnathan* were abandoned. *California v. Deep Sea Research, Inc.*, 523 U.S. at 507-08. The Court affirmed the court of appeals' determination of jurisdiction over the *Brother Johnathan*, stating simply that "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *Id*, at 508. The Court did not then go on to define the meaning of abandonment of admiralty law, instead leaving that issue for another day.

The Sixth Circuit discussed the conflict among the circuits in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1091 (1998). The court of appeals distinguished the test for abandonment under admiralty law from the test under the Abandoned Shipwreck Act of 1987, stating that the ASA did not contemplate an express abandonment, which is "obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." *Id.* at 1085. After discussing the conflict between the inferred abandonment standard of the *Brother Jonathan* and the "opposing view" in

Columbus-America, the Sixth Circuit held that it would "follow the lead of *Brother Jonathan* rather than that of *Columbus-America*." *Id.* On remand, while continuing to eschew the Fourth Circuit's express abandonment standard, the Sixth Circuit further ripened the circuit conflict by requiring proof of abandonment by "clear and convincing evidence," as required by the Fourth Circuit, rather than the "preponderance" standard applied in the First, Fifth, Ninth and Eleventh Circuits, in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 177 F.3d 63 (6th Cir. 1999).

Thus, the conflict among the circuits goes beyond the strict definition of abandonment, and also extends to presumptions and the burden of proof. *See generally Jones, The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Johnathan*, 30 J. Mar. L & Comm. 205, 213-220 (1999); McGaulghlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLAJ. L. & ARTS 149 (1995); Lorello, Jr., Comment, *The Abandoned Shipwreck Act: Navigation through the Fog*, 35 Gonz. L. Rev.75 (1999/2000).

Some circuits create a presumption of abandonment if the vessel has been sunken for 75 years or more. The First Circuit has presumed abandonment based on the passage of time. *See Martha's Vineyard Scuba Headquarters v. Unidentified, wrecked and Abandoned Steam Vessel* 833 F.2d 1059, 1064-65 (1st Cir. 1987) (abandonment where articles have been "so long lost that time can be presumed to have eroded any realistic claim of original title.") The Fifth and Eleventh Circuits have also presumed abandonment based on the lapse of time. *See Treasure Salvors, Inc. v. Unidentified & Wrecked Sailing Vessel*, 569 F2d

330, 337 (5th Cir. 1978) ("Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths"); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel* 758 F2d 1511, 1514 (11th Cir. 1985) ("The common law of finds is the appropriate law to examine to determine the ownership of the shipwreck."). The United States has espoused this definition of abandonment in its brief in *California v. Deep Sea Research, Inc.*, positing that abandonment may be presumed from the passage of time. *See* 1997 WL473386 at *39-46.

In other circuits, abandonment is not presumed based solely on the passage of time, but instead may be inferred. The Third, Sixth and Ninth circuits permit an inference of abandonment based on a consideration of all the facts and circumstances of the case. *Compare Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 387-88 *with Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d at 1084[5] Even those circuits are in conflict, however, as to the burden of proof of abandonment. Whereas the Ninth Circuit imposes a preponderance standard, the Sixth Circuit requires proof by clear and convincing evidence. *See Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 386; *Fairport International Exploration, Inc. v. The*

[5] Those circuits usually distinguish the abandonment of merchant vessels and other private property from the requirement of express abandonment that applies to property of the sovereign. *See United States v. Steinmetz*, 973 F. 2d 212, 223 (3rd Cir. 1992), *cert. denied* 507 U.S. 984 (1993) ("[A]though an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress").

Shipwrecked Vessel Known as the Captain Lawrence, et al., 105 F.3d at 1084. Still further compounding the confusion, even within circuits, it is not clear whether the absence of technology is a bar, per se, to a finding of abandonment, or instead one factor to be weighed with the totality of the other evidence. *Compare Yukon Recovery, LLC v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000) *with Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 387-88.

At the opposite end of the spectrum, the Fourth Circuit and its adherents require that where an owner asserts a claim title, there must be clear and convincing evidence of an express, affirmative abandonment. Pet. App.52a, 53a; *Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999). The express abandonment approach rejects a factual inquiry into all the circumstances that other courts employ to determine abandonment, since, as a matter of law, there can be no abandonment absent "an owner's express declaration abandoning title." *Sea Hunt*, 47 F. Supp. 2d at 687, *quoting Columbus-America v. Atlantic Mutual*, 974 F.2d. 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). When an owner appears, abandonment can only be proved "by clear and convincing evidence... such as an owner's express declaration abandoning title." Pet. App. 52a. A finding of abandonment can occur in only "two categories" of cases—either where owners "expressly and publicly abandoned their property" or where "no owner appears." Pet. App. 53a; *Sea Hunt*, 47 F. Supp. at 687. There is no role under the Fourth Circuit's test for an inquiry into factual circumstances under the doctrine of *animus revertendi*; instead, the standard for abandonment is the same for private and public vessels: express abandonment. *Sea Hunt*, 47 F. Supp at 688.

The express abandonment approach accentuates the sinister effects of the conflict among the circuits. Under the Fourth Circuit's test, no abandonment can be found absent an express declaration renouncing title. Since such an express declaration will never occur in the case of valuables, no abandonment will apply in any case where a purported owner appears, whether the successor to a defunct insurance company, an alleged descendant or a legatee. Pet. App. 53a (where parties who "intend to assert a claim of ownership" appear, salvage law applies). So clear is the outcome under this test that the Fourth Circuit majority observed in reference to the bifurcated trial in *Columbus-America* that "the necessity of having a second phase should have appeared fairly certain to the district court" even before hearing any of the extensive factual evidence of abandonment in the case. Pet. App.72a. The express abandonment approach would foreclose any factual inquiry into all the circumstances, clinging instead to a wooden and senseless rule that property long lost to its original owner should be kept from all others, even those who would be willing and able to exert the ingenuity and effort to recover it and return it to beneficial use.

II. ABSENT ACTION BY THE COURT, THE EXISTING CIRCUIT CONFLICT WILL CONTINUE TO ANNUL CONGRESS' ENACTMENTS, GENERATE COSTLY AND TIME-CONSUMING LITIGATION, BLUR STATE-FEDERAL JURISDICTION, AND SPAWN CONFUSION IN THE LAW GOVERNING THE PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS

The uncertainty over the admiralty law standard for abandonment has important implications for the law governing management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in 1988* U.S.C.C.A.N. 365. The state and federal governments have determined a vital public interest in protecting cultural resources from pillage, and Congress and the States have accordingly passed legislation aimed at protecting historic shipwrecks.[6]

The major federal statute on point is Abandoned Shipwreck Act of 1987, 43 U.S.C. §2101-2106 ("ASA"). Prior to the ASA, because of conflicting decisions among the courts on the applicable law, state governments had been forced to incur enormous trouble and expense in protecting historic shipwrecks

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[6] All 50 states have programs of cultural resource management, and 40 have established programs for the protection of historically significant shipwrecks. See generally H.R. Rep. No. 514, 100 th Cong., 2d Sess., pt. 2, at 2 (1988).

within their waters. Congress sought to clarify the states' ability to exercise stewardship over these resources, so that the states would no longer be required to squander their time and money defending their power to manage the preservation of historic shipwrecks. S. Rep. No. 241, 100th Cong., 1st Sess. 3 (1988); 134 Cong. Rec. H1178, 1183 (Mar. 28, 1988).

Under the ASA, the United States asserted title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, and then transferred title to most shipwrecks to the State on whose submerged land they are located. 43 U.S.C. §2105. Many states have statutes similarly aimed at protecting historic shipwrecks, most of which define their coverage in terms of abandonment. *See* H.R. Rep. No. 514 (I) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (listing statutes). The ASA encouraged states to take steps to protect valuable abandonment shipwrecks for recreational and historical purposes. 43 U.S.C. §2104. The text of ASA, however, contains no definition of the term "abandoned."

Since the Court has held that the meaning of "abandoned" under the ASA is the same as its meaning under the law of admiralty, *California v. Deep Sea Research, Inc.*, 523 U.S. at 508, the circuit conflict over abandonment has virtually nullified Congress' enactment. The conflict creates the exact opposite of the result that Congress had sought, creating new and expensive litigation for the states, hamstringing the states in their efforts to manage the preservation of historic shipwrecks in their waters, and has clouding the respective jurisdictions of the state and federal governments over shipwreck management.

The circuit conflict encourages ingenious artifices for evading state and federal legislation protecting shipwrecks. For example, to get around Congress' intent, enterprising salvors have taken to

the simple expedient of buying up the centuries-old claims to historic shipwrecks of insurance companies and others, thereby emasculating state and federal efforts at historic preservation. *See e.g. Zych v. The Lady Elgin*, 755 F. Supp. 213 (N.D. Ill. 1990). The protection and management of historic shipwrecks has thus become more precarious now than before the passage of the ASA.

The express abandonment standard applied by some courts entirely abrogates the power of the state and federal governments to manage historic shipwrecks. Absent as an express abandonment, the ownership claim of anyone who appears to assert an interest is preserved, and the shipwreck is not considered abandoned. Pet. App. 53a. The express abandonment standard has the potential of removing from the coverage of the ASA's protection any number of shipwrecks that would previously have been considered abandoned.

Accordingly, the circuit conflict on the admiralty law standard for "abandonment" implicates substantial state and federal interests, resources, and potential liabilities—as well as the recognition of federalism embodied in the ASA's grant of authority over shipwrecks to the States. The Court's attention to the issue is warranted now to avoid further confusion.

III. THE COURT'S ACTION TO RESOLVE THE CIRCUIT CONFLICT IS IMPORTANT TO THE PROGRESSIVE DEVELOPMENT OF ADMIRALTY LAW AND THE EMERGING NEW FIELD OF HIGH TECHNOLOGY MARITIME EXPLORATION

The Court's constitutional role in resolving circuit conflicts is especially important in admiralty. The issue raised here "is one of importance in the development of the law maritime, as to which [the Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

A. New Advances in Marine Recovery Technology Have Multiplied Conflicts Over the Law of Long-Lost Shipwrecks, Requiring the Court's Attention

The development of new maritime technologies has made conflict among ancient admiralty law doctrines inevitable. With the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of abandonment an issue of growing significance. *See* T. Schoenbaum, *Admiralty and Maritime Law* 513 (1987).

Over the past 20 years, the issue of abandonment has recurred in virtually every major historic shipwreck case, and has reached a crescendo over the past five years. On the date of filing of this Petition, cases which hinge on the admiralty law standard for abandonment are pending in district courts across the country, as well as on the dockets of the Fourth, Sixth, and Eleventh Circuits. Since the date of the Court's decision in *California v.*

Deep Sea Research, the gap among the circuits has grown, with each new decision reiterating the circuit split.

As to the issues presented by these growing conflicts, this case has already been recognized by the public, the maritime industry, and the admiralty bar as a landmark. Numerous articles in the popular press both in this country and abroad have recounted the search for the ship and its treasure, with many focusing on the legal issues presented. *See e.g* Kinder *supra* at 499-505; *Salvor Must Give up Treasure, USA Today, August 28, 1992, Divers Mine Depts. for Treasures, Washington Times, Oct. 19, 1990; Sunken Treasure! Reader's Digest Dec. 1990; Chasser le Tresor et Garder l'or, Agence France Press,Aug. 20, 1990; Salvage Group Backed by Court, International Herald Tribune, August 16, 1990, Treasurers Finders are Keepers, USA Today, August 15, 1990; Pieces of Eight,* The Economist, Mar. 17, 1990; *The Sinking that Shook America,* U.S. News & World Report, Sept. 25, 1989*; Sunken Treasure*, The Economist, Aug. 26, 1989.

Legal scholars, as well, have recognized the significance of this case to the conflict among the circuits regarding the admiralty law standard for abandonment. *Compare* Jones, *supra* (issue of abandonment requires the attention of the Supreme Court) *with* T. Schoenbaum, *Admiralty and Maritime Law* 513 (1987) (cases "are in conflict on several points" in approaching long-lost wrecks) *and* Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J. Dec. 4, 1992, at 3, 4, (there is a need for resolution by the Supreme Court of the abandonment issue, including "[w]hat proof is needed to show presumptions regarding property interests"). The district court's published opinion sets forth clear findings of fact upon a well-developed record. The court of appeals reversed the district court's finding on the basis of a clearly

stated rule of law against abandonment in any case in which an owner appears. Absent action by the Court, in each instance where Columbus-America seeks a declaration of title as its recovers items in the future, the court of appeals' express abandonment standard will be binding. Pet. App. 28a. *See also Sea Hunt v. The Unidentified Shipwreck Vessel*, 47 F. Supp. 2d at 688 (express abandonment standard binding on all shipwreck recoveries in Fourth Circuit).

B. The Circuit Conflict Chills Ocean Exploration and Burdens Admiralty Courts That Must Adjudicate Rights in Long-lost Vessels.

Although the Federal Government's public policy strongly encourages deep sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technologies, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Preservation—Background Paper*, OTA-BP-E-37, 8 (1987).

The split among the circuits over the admiralty law standard for abandonment has hampered such deep sea discovery. The existing confusion has spawned years of costly, time-consuming litigation that has diverted valuable resources from the control room of scientific research vessels to the courtrooms across America. What the dissenting Opinion in the *Columbus-America* case predicted about the consequences of the circuit conflict has come to pass, in spades: opportunities for advancing scientific and historical knowledge have been lost; and scientists and historians have

been tied up in lengthy discovery and trial proceedings--eroding the public's confidence in the judicial system.

The uncertainty in the law of abandonment also burdens admiralty courts with the difficult task of dividing treasure based on claims given ageless vitality, but whose validity or size is not evidenced by documentation. As the *Columbus-America* dissent put it:

> On remand, the district court will be faced with the difficult, if not impossible, task of determining which claims were paid by the insurance companies and in what amounts. This problem is caused by the insurance companies' failure to maintain the records necessary to establish their claims. Had the insurance companies not abandoned their claims they surely would have maintained true records necessary established their amount.

Pet. App. 83a n.7. Application of a definitive standard for abandonment under maritime law would achieve certainty and finality in the laws by disfavoring a purported owner's claims that are not supported reliable evidence. The absence of such a clear standard, in contrast, leaves admiralty courts in future cases with a "Herculean task." *Id.*

The conflict among the circuits breaks with the intent of the Framers of the Constitution that admiralty law be uniform throughout the nation. The Court has recognized its constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.' " *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970). Moreover, the existing circuit conflict places the United States at

odds with international maritime law. *See* M. Leich, 8 *Digest of United States Practice In International Law* 999, 1004 (1980) (under international maritime law, inferred abandonment applies to merchant vessels and express abandonment to sovereign vessels). *See also Pierce v. Bemis (The Lusitania)*, 1 Q.B. 384, 385 389 (1986; *The Queen v. Mar-Dive Corp., et al.* [Dec. 20, 1996], 1996 Ont. C.J. LEXIS 3947, at *109-*110.

C. The Circuit Conflict Presents an Open Invitation to Stale Claims and Forum Shopping.

Continued doubt about the standard for abandonment under admiralty law presents an open invitation to stale, speculative and possibly fraudulent claims. As has been observed in another case, "there is gold beneath the ocean, while above ground there are men who covet it." *Standefer v. Thompson,* 939 F.2d 161, 162 (4th Cir. 1991). The incorrigible human temptation to puff up claims infests disputes over long-lost treasure, where evidence has aged for scores of years and great wealth hangs in the balance. By according purported ownership interests in long-lost shipwrecks such a strong presumption of ageless vitality, the "express abandonment" theory elevates them far above any property interests recognized by our legal system.

The circuit discord over abandonment gives prospective claimants a blank check to advance doubtful or fraudulent claims, alluring them to shop around for the forum most favorable to the facts of their case. For disputes over historic shipwrecks, forum shopping is easy because venue obtains in any district where shipwreck artifacts may be brought upon recovery. *See* 28 U.S.C. Sec. 1333. *See generally, Treasure Salvors*, 640 F.2d 560, 567-68 (5th Cir. 1981). With the circuits in conflict, litigants pick and choose among forums based primarily on how a prospective jurisdiction's standard for abandonment

meshes with the facts of the case. Litigants can simply take the artifacts to whichever forum follows the abandonment standard most favorable to the facts of their case. Only action by the Court will resolve the conflict and guide the lower courts.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2120

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellant,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; JACK F. GRIMM; JOANNE LAMPE CHARLTON, Personal Representative of the Estate of Harry G. John,
Intervenor-Plaintiff,

versus

ATLANTIC MUTUAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY, LIMITED; ROYAL INSURANCE COMPANY, LIMITED; SUN ALLIANCE GROUP; GRE OF AMERICA CORPORATION; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellees,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude, (believed to be the S. S. Central America), *in rem*;

Defendant,

THE INSURANCE COMPANY OF NORTH AMERICA; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SALVAGE ASSOCIATION; UNDERWRITERS AT LLOYD'S; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LIMITED; GUARDIAN ROYAL EXCHANGE; ROYAL EXCHANGE ASSURANCE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; INDEMNITY MARINE ASSURANCE COMPANY, LIMITED; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LIMITED; MARINE INSURANCE COMPANY, LIMITED; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew, and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONTDOHERTY

GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INCORPORATED,

Claimants.

No. 98-2198

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellant,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; JACK F. GRIMM; JOANNE LAMPE CHARLTON, Personal Representative of the Estate of Harry G. John,

Intervenor-Plaintiff,

versus

ATLANTIC MUTUAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY, LIMITED; ROYAL INSURANCE COMPANY, LIMITED; SUN ALLIANCE GROUP; GRE OF AMERICA CORPORATION; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Claimants-Appellees,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude, (believed to be the S. S. Central America), *in rem*;

Defendant,

THE INSURANCE COMPANY OF NORTH AMERICA; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SALVAGE ASSOCIATION; UNDERWRITERS AT LLOYD'S; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LIMITED; GUARDIAN ROYAL EXCHANGE; ROYAL EXCHANGE ASSURANCE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; INDEMNITY MARINE ASSURANCE COMPANY, LIMITED; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LIMITED; MARINE INSURANCE COMPANY, LIMITED; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew, and all persons aboard; BOARD OF TRUSTEES OF

COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INCORPORATED,

Claimants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CA–87–363–N)

Argued: March 2, 1999 Decided: February 8, 2000

Before WIDENER, WILLIAMS and MICHAEL, Circuit Judges.

Affirmed in part, vacated in part, reversed in part, and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Williams and Judge Michael joined.

ARGUED: R. Hewitt Pate, HUNTON & WILLIAMS, Richmond, Virginia; Richard T. Robol, COLUMBUS-AMERICA DISCOVERY GROUP, INC., Columbus, Ohio, for Appellant. George Robert Daly, I, BIGHAM, ENGLER, JONES & HOUSTON, New York, New York; Guilford D. Ware, CRENSHAW, WARE & MARTIN, P.L.C., Norfolk, Virginia, for Appellees. **ON BRIEF:** Sarah C. Johnson, John

S. Martin, HUNTON & WILLIAMS, Richmond, Virginia; Robert W. Trafford, James D. Curphey, PORTER, WRIGHT, MORRIS & ARTHUR, Columbus, Ohio, for Appellant. David H. Sump, CRENSHAW, WARE & MARTIN, P.L.C., Norfolk, Virginia, for Appellees.

WIDENER, CIRCUIT JUDGE:

The appellant, Columbus-America Discovery Group, appeals three orders of the district court: an order entering a previously signed agreed order of settlement and dismissal, a sua sponte order of the district court partially vacating the previously entered agreed dismissal order, and a third order unsealing the inventory of the treasure recovered by Columbus-America from the shipwreck S.S. Central America. For the reasons that follow, we affirm in part, vacate in part, reverse in part, and remand the case to the district court for further proceedings consistent with this opinion.

In 1857, the S.S. Central America sank in the Atlantic Ocean during a powerful storm. Many lives were lost as well as substantial sums of gold belonging to passengers and a large commercial shipment of gold in route from California to New York. In 1988, after years of searching, the Columbus-America Discovery Group, a group of scientists, engineers, ocean explorers, and other experts led by scientist and ocean engineer Thomas G. Thompson, found the sunken ship at the bottom of the ocean 160 miles off the South Carolina coast. (974 F2d 455, 742 F. Supp at 1330)

After finding the Central America, Columbus-America Discovery Group (hereinafter referred to as Columbus-America or CADG) brought an *in rem* proceeding in admiralty seeking to establish ownership of and the right to salvage the defendant ship and its cargo of gold and other artifacts. The district court found that Columbus-America was a first salvor under substantive admiralty law and thereby entitled to salvage the ship without interference and to the exclusion of other salvors. In its order of August 18, 1989, the district court granted Columbus-America an injunction which permanently enjoined and restrained any other persons from conducting search, survey, or other salvage operations of the site. Columbus-America Discovery Group Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 837-363-N (E.D. Va. Aug 18, 1989).

On September 29, 1989, the Underwriters and other insurers or their successors-in-interest intervened in the *in rem* proceeding, each claiming that it had underwritten the risk of loss and had paid claims for portions of the lost gold which all together totaled approximately $1,219,189.00. On April 3, 1990, the district court entered an order closing the action to the filing of additional claims against the defendant ship or to any items recovered therefrom whether recovered prior thereto or subsequently. Columbus-America Discovery Group Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 837-363-N (E.D. Va. April 3, 1990).

Following a trial, the district court entered its final order and opinion on August 14, 1990 holding that the Underwriters had abandoned any interest they may have had in the gold and that Columbus-America was entitled to keep

everything recovered from the ship. Columbus-America Discovery Group Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F. Supp. 1327, 1348 (E.D. Va. 1990). The Underwriters appealed and a divided panel of this court held that the district court erred in applying the law of finds, rather than the law of salvage. The panel remanded the case to the district court to apply the law of salvage and for discovery and determination of the appropriate salvage award for Columbus-America. Columbus-America Discovery Group v. Atlantic Mut. Ins Co., 974 F.2d 450, 468 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993).

Following discovery and trial on remand, the district court entered an order on November 18, 1993 finding that Columbus-America was entitled to a salvage award of 90 percent of the recovered gold allegedly insured by the Underwriters. An issue at that time, as now, was the marketing of the gold. The district court found that all parties agreed that a marketing plan was necessary. The court credited the reasoning of several marketing experts who were of opinion that the marketing plan should extend for some period of years. The court instructed the parties to agree to a central authority to conduct marketing of the gold and to present the court with a detailed plan for marketing, or if the parties could not agree, to make such recommendations to the court. Unable to agree on which party should act as the central marketing authority, the Underwriters asked the court to direct an award to the parties in kind. In an order entered January 13, 1994, the district court denied this request, finding that this approach was contrary to the Underwriters' earlier position, to the testimony of the experts, and to the greater weight of the evidence on the issue of marketing. The court then designated Columbus-America as the central

marketing authority based on the work Columbus-America had already performed in consulting with numerous marketing experts, Columbus-America's collection of a great quantity of information concerning marketing; and Columbus-America's far greater interest in a successful and proper marketing because of its investment in the project and its significantly higher share of the salvage award.

The Underwriters again appealed, and Columbus-America cross-appealed on the grounds that the individual Underwriters had not established proof of what portion of the gold, if any, to which they were actually entitled. A panel of this court affirmed the district court's judgment that Columbus-America was entitled to a salvage award of 90 percent of the treasure. We also affirmed the district court's order that the gold should be marketed as a whole with Columbus-America acting as the central marketing authority. Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 56 F.3d 556 (4th Cir.), cert. denied, 516 U.S. 938 (1995)[1]

On remand, the district court provided certain terms and conditions under which Columbus-America was to proceed with marketing the remaining gold. See order and judgment of April 19, 1996. Following the death of the district court judge, Richard B. Kellam, the case was reassigned to Judge Clarke, and he issued a very similar marketing order on August 13, 1996.[2]

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[1] A more detailed account of the facts can be found at 742 F. Supp. 1327 (E.D. Va. 1990) and 974 F.2d 450 (4th Cir. 1992)

[2] Judge Russell and Judge Hall from the original panel of this court have since died.

Over the following months, the relationship between the remaining underwriters and Columbus-America became more contentious. Despite the marketing evidence relied on by the district court and the district court's statement in its order of April 19, 1996, that "the property has not yet been converted to money and will not be for some five or more years," the Underwriters pushed for immediate sale of the gold and their share of the proceeds or for division of the gold *in specie*. Columbus-America sought to keep the gold together and argued for the development of the long-range marketing approach recommended by its marketing experts, which it argued would also help protect and satisfy investors in the project. Between August 14, 1996 and May 1998, there were some 61 docket entries in this case, the majority of which involved the marketing issue. On May 4, 1998, the district court announced that it had removed Columbus-America as marketer. The court gave Columbus-America a choice – it could (1) agree with the Underwriters to effect an *in specie* division of the treasure or (2) leave the court to appoint the underwriters to handle marketing and sale of the treasure, but if the Underwriters declined this appointment, it would appoint a special master or hire a third party to do so. On May 19, 1998, counsel for both parties signed a settlement agreement which stated that the parties agreed to divide the treasure *in specie*. The agreement provided that the settlement was conditioned, among other things, upon the following:

> The parties signed a "Dismissed Agreed" order dismissing all claims of the parties with prejudice, including claims for interest, attorneys fees, costs and custodial expenses. The order will be delivered to Magistrate Judge Tommy

> Miller as custodian thereof on or before May 29, 1998, to be entered once the *in specie* division is performed...

The agreement further stated that "[u]pon the failure of any of the conditions set forth in paragraph 2, the parties agree that the settlement will be null, void, and of no effect." Finally, the agreement stated that:

> In the event the settlement is completed as set forth in this agreement, the endorsed "Agreed" Order as referenced in paragraph 2 (c) shall be delivered to Judge J. Calvitt Clarke, Jr. for entry and upon the entry therefore, each party shall be considered released from the other from all liability of any nature whatsoever that may arise by virtue of any claim that was or may have been asserted in the action.

The Settlement Agreement was signed by both parties and filed with the court on May 21, 1998. As per the Settlement Agreement's express condition, the agreed dismissal order was consented to and signed on May 19, 1998 by counsel for both parties and given to Magistrate Judge Miller to be held in escrow until completion of the settlement. On June 17, 1998, the res was divided according to the Settlement Agreement and the Underwriters took possession of their portion.

Following the division of the res, but prior to the entry of the previously signed agreed dismissal order, Thomas G. Thompson, Columbus-America's President, informed the court by letter to Magistrate Judge Miller dated June 22, 1998 that Columbus-America wished to withdraw from the

Settlement Agreement and the agreed dismissal order. Thompson stated in the letter that he regretted the agreement to divide the treasure *in specie* and that he believed it preferable to allow the Underwriters to market and sell the res as a whole.

A hearing was held on June 23, 1998 at which counsel for Columbus-America moved for substitution of counsel and for a delay in entering the proposed agreed order or alternatively for withdrawal of Columbus-America's consent to the entry of the order. Additionally, counsel requested that if the court denied the motions, the order be changed to indicate that Columbus-America had seen, objected to, and taken exception to entry of the order rather than be entered as an agreed order as previously signed. The court denied the motions as untimely and entered the agreed dismissal order as written, without noting Columbus-America's objection.[3] Subsequently, however, on July 1, 1998, the court entered a second order in which it vacated the agreed dismissal order entered on June 23, 1998 "to the extent it dismisses this *in*

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[3]The court stated in its Memorandum Opinion of June 25, 1998:

> A Settlement Agreement was executed stating how the division would take place and when a pre-drafted and pre-signed agreed dismissal order would be entered. All the contingencies in the Settlement Agreement have been resolved and the agreement was fully consummated by the parties as of June 17, 1998 [the date on which the res was physically divided]. All that remained to be done on June 23 was for the Court to enter the agreed dismissal order, which it did. At that point, it was too late for CADG to reverse its assent to the completed *in specie* division, withdraw from the fully consummated Settlement Agreement, or recant its voluntary agreement to the dismissal order.

rem action against the Defendant wreck." Finally, in a third order entered July 31, 1998, the court granted the Underwriters' motion to unseal the inventory of recovered treasure. Columbus-America now appeals these orders entered on June 23, July 1, and July 31, 1998, which we address in turn.

We first address the district court's authority to enter the original "Dismissed Agreed" order that each party's counsel signed in accordance with the Settlement Agreement.

A.

A trial court has inherent equitable power to enforce summarily a settlement agreement "when the practical effect is merely to enter a judgment by consent." Millner v. Norfolk & Western Ry. Co., 643 F.2d 1005, 1009 (4th Cir. 1981). However, if there is a material dispute about the existence of a settlement agreement or the authority of an attorney to enter a settlement agreement on behalf of his client, a trial court must conduct a plenary evidentiary hearing to resolve that dispute. Millner, 643 F.2d at 1009.

As a general rule, counsel of record have the apparent authority to settle litigation on behalf of their client. Moore v. Beaufort County, North Carolina, 936 F.2d 159, 163 (4th Cir. 1991). However, apparent authority can be limited by the principal, "and if the limitation is brought to the attention of the parties...the limitation must be respected by such parties." Pasco County Peach Ass'n v. J.F. Solley & Co., 146 F.2d 880, 883 (4th Cir. 1945); Restatement (Second) of Agency § 125 (1958) (apparent authority terminates when third person has notice of a manifestation by the principal that he no longer

consents).

Prior to the entry of the agreed dismissal order, Columbus-America indicated that it wished to withdraw its consent to the Settlement Agreement, which it did by sending a letter to Magistrate Judge Miller on June 22, 1998 and then by motion at the hearing before the district court on June 23, 1998. Presumably, at least, the intent of the letter was to revoke the apparent authority of Columbus-America's attorneys, and under Millner, a separate hearing would have been required to resolve any dispute as to counsel's authority. However, without conducting a separate hearing, the district court denied these motions as untimely.

While the district court apparently erred in failing to conduct a separate hearing on Columbus-America's objection to the entry of the agreed dismissal order, we are further of opinion that such error is not reversible. Columbus-America does not dispute the existence of the Settlement Agreement or that each of the conditions to entering the agreed dismissal order was satisfied. The record also indicates that each condition to the Settlement Agreement was either met or waived, leaving only the entry of the agreed dismissal order to be completed. This court has held that setting aside an otherwise valid agreement is not justified because a party has second thoughts about the results. See Young v. FDIC, 103 F.3d 1180, 1195 (4th Cir. 1997) (citing Petty v. Timken Corp., 879 F.2d 130 (4th Cir. 1988)).

Any argument that Columbus-America's counsel may have lacked authority to enter into the Settlement Agreement is without merit because the record clearly shows that Thompson, Columbus-America's President, authorized its

attorney to execute the contract of settlement at issue here.[4] Plainly stated, a plenary hearing could only have established that Columbus-America's attorney had actual authority to execute the Settlement Agreement on May 19, 1998, which he did. This evidence would have allowed the district court to enforce summarily the Settlement Agreement by entering the agreed dismissal order. Millner, 643 F.2d at 1009. Because the district court's entry of the agreed dismissal order was correct, although for a different reason, we affirm entry of the order. See Securities and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (a lower court's decision must be affirmed if the result is correct although it may have relied upon a different reason).

B.

We next address whether the district court had jurisdiction to enforce the Settlement Agreement after entering the agreed dismissal order. Federal courts are courts of limited jurisdiction whose power is derived from the Constitution and statute, and that power cannot be expanded by judicial decree. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Generally, a district court may not enforce a Settlement Agreement unless "the agreement had been approved and incorporated into an order of the court, or, at the time the court is requested to enforce the agreement, there exists some independent ground upon which to base federal

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[4] In an affidavit signed on July 14, 1998, Columbus-America's President, Thompson, acknowledged that the Settlement Agreement was at his instruction. Although the affidavit states that his authorization to settle was given to comply with a perceived court order to settle, Columbus-America does not in this appeal raise an issue of compulsion or duress by the district court.

jurisdiction." Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299, 1303 (4th Cir. 1978). However, if the Settlement Agreement is approved and incorporated into an order of the court, a breach of the agreement is a violation of the order, and the district court possesses jurisdiction to enforce the agreement. Kokkonen, 511 U.S. at 381; Fairfax, 571 F.2d at 1303 n.8.

The agreed dismissal order signed by the parties in this case specifically notes that "[t]he Court retains jurisdiction to enforce the settlement of the parties and the prior Orders in this case." Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 837-363-N (E.D. Va. June 23, 1998). Under Kokkonen and Fairfax, we hold the above quoted language is sufficient to grant the district court jurisdiction to enforce specifically the Settlement Agreement.

III.

We next address the district court's ability to partially vacate the original agreed dismissal order entered June 23, 1998 by entering a second order on July 1, 1998. Columbus-America asserts that the district court lacked authority to modify terms of the agreed dismissal order signed by the parties pursuant to the Settlement Agreement. We agree.

As discussed supra, a district court has inherent jurisdiction and equitable power to enforce certain agreements entered into during settlement of litigation before that court. Millner, 643 F.2d at 1009. Authority to enforce such an agreement, however, applies to the agreement in its entirety, not to such selected parts that the court deems appropriate. Ozyagcilar v.

Davis, 701 F.2d 306, 308 (4th Circ. 1983). If the court determines that such a settlement agreement is only a partial settlement, then it should reject the whole. See Wood v. Virginia Hauling Co., 528 F.2d 423, 426 (4th Cir. 1975) (district court may either implement a complete settlement agreed to by the parties or restore them to the status quo).

The Settlement Agreement entered into by Columbus-America and the Underwriters was expressly conditioned upon the "[p]arties signed a 'Dismissed Agreed' order dismissing all claims of the parties with prejudice." The proposed agreed dismissal order stated in pertinent part:

> On representation of the parties by their counsel that the parties have completed the division of the res as set forth in the Settlement Agreement signed on their behalf on May 19, 1998, all claims, matters, and issues raised in this case. . .have been resolved to the satisfaction of the parties and all court costs have been paid: it is ORDERED THAT:
>
> 1. This case is "DISMISSED AGREED" including all claims, matters, issues, interest, attorneys' fees, costs and custodial expenses incurred by the parties being DISMISSED WITH PREJUDICE.

Moreover, the Settlement Agreement stated that upon completion of the conditions of settlement, each party would be "considered released from the other from all liability of any nature whatsoever that may arise by virtue of any claim that was or may have been asserted in this action." Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 837-363-N (E.D. Va. June

23, 1998) (Settlement Agreement).

On June 23, 1998, the district court entered the agreed dismissal order, which by its terms, dismissed agreed with prejudice all claims pursuant to a valid settlement agreement. Then, in its order of July 1, 1998, the court vacated the agreed Order "to the extent" that the Agreed Order dismissed *in rem* action against the Defendant wreck, but left intact all other rights and responsibilities of the parties under the Settlement Agreement. The district court stated two reasons for its entry of the July 1, 1998 order: one, to retain in rem jurisdiction over the wreck to protect the salvor-in-possession rights of Columbus-America, and two, the court found as fact that there had not been a meeting of the minds. The court noted that the parties "disagree about whether their settlement agreement covers any future treasure salvaged from the wreck" and "a dispute will inevitably arise as to whether the Underwriters are entitled to any of it."

We first note that both Columbus-America and the Underwriters agreed that the Settlement Agreement eliminates the possibility of claims between the parties over future salvage. Columbus-America states in its brief that dismissal of all claims of the parties was a "key, material term of the Agreement." {Blue brief pg. 14}. The Underwriters also construe the Settlement Agreement as eliminating claims to future salvage. In their brief, they state that "Underwriters confirm that in accordance with the Settlement Agreement, they have no future claim. Underwriters' position that the Settlement Agreement settles all claims with prejudice, including rights to any future treasure salvaged by CADG, is consistent with the understanding of CADG." {Red brief pg. 20}.

Thus, contrary to the district court's assertion and construction of the Settlement Agreement, the parties had a meeting of the minds of the issue of future salvage. The Underwriters have no claim in any future treasure salvage from the wreck, and we so hold. Any contrary indication in the order of the district court of July 1, 1999 is reversed.

The settlement was conditioned upon entering an order dismissing "all claims, matters, and issues raised in this case." Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. 837-363-N (E.D. Va. June 23, 1998) (Settlement Agreement). The district court expressly reasoned that it changed the terms of the agreed dismissal order to retain in rem jurisdiction over the shipwreck and to adjudicate the Underwriters' claims to treasure recovered from the wreck in the future, claims the court found would inevitably arise. By amending the original order, which we and both parties interpret to deny all future claims of the Underwriters to future treasure salvaged from the Central America, the district court altered the Settlement Agreement by providing that future claims between the parties were in fact not settled, rather were inevitable, and the court would retain jurisdiction to adjudicate these future claims. The district court's alteration of the agreed dismissal order had the effect of rewriting the Settlement Agreement by eliminating a term to which both parties had already agreed, namely that the Underwriters had no claim to any future salvage from the Central America.

The order of the district court filed July 1, 1998 was premised in part on its opinion that the Dismissed Agreed order, filed June 23, 1998, had "dismissed the in rem action

with regard to the defendant wreck." The order of July 1, 1998 then changed that part of the Dismissed Agreed order so that "the in rem action must remain open to continue the court's jurisdiction over the defendant wreck." It stated that such order "enabled the court to monitor CADG's activities as salvor in possession and adjudicate any disputes with regard to treasure salvaged by CADG in the future."

> The district court concluded that:
> [a]ccordingly, the Agreed Dismissed order is hereby vacated to the extent it dismisses this *in rem* action against the defendant wreck. This order, however, in no way relieves CADG and the Underwriters of the rights and responsibilities under the Settlement Agreement.

As we have demonstrated above, there is no dispute with regard to any claim by the Underwriters to treasure salvaged by CADG in the future. There is no such claim by the Underwriters. So this support for changing the Dismissed Agreed order filed June 23, 1998, does not exist.

We do not agree with the district court that the Dismissed Agreed order filed June 23, 1998 dismissed the in rem action with regard to the defendant wreck. The order is with respect to "all claims, matters and issues raised in this case." (Italics added). "This case" on appeal is the quarrel between the Underwriters and Columbus-America and is not a case with respect to the jurisdiction of the district court over the defendant wreck. That case is the in rem action of Columbus-America Discovery Group, et al., v. The Unidentified Wrecked and Abandoned Sailing Vessel, *in rem* et al., District Court No. 87-363-N, which has been pending for more than twelve years, and which the Settlement Agreement and this

Dismissed Agreed order leave pending except that all of the quarrel between Columbus-America and the Underwriters is here disposed of. We thus construe the Dismissed Agreed order of June 23, 1998 as not relinquishing jurisdiction of the district court over the wreck of the Central America and are of the opinion and hold that the jurisdiction of the district court over the wreck of the Central America in the in rem action with respect to that wreck, it is able to enforce its previous orders in the case with respect to that wreck.

Our construction of the Dismissed Agreed order of June 23, 1998 is supported by the authorities and the Rules of Civil Procedure. This is an interlocutory appeal in an admiralty case under 28 U.S.C. § 1292(a)(3) . Such appeals decide only the matters which have been decided by the district court, and as with other interlocutory appeals under § 1292, the trial court has authority to pursue its own proceedings filed when a § 1292(a) (3) appeal is pending. Wright, Miller, Cooper, Federal Practice and Procedure, § 3927 (2d ed. 1996).

Although in slightly different context, the Court has spoken to the very problem before us here as to the effect of an interlocutory appeal. We think that reasoning applies in this case and follow it:

> Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise

specially ordered.

Ex parte Nat. Enameling & Stamping Co., 201 U.S. 156, 162 (1906).

So, we are left with the change in the Settlement Agreement the district court effected in the Dismissed Agreed order with respect to "whether Underwriters retain any rights to treasure salvaged by Columbus-America Discovery Group in the future," which was unauthorized as well as being in error. We conclude that the order of the district court filed July 1, 1998 effecting changes in the Dismissed Agreed order of June 23, 1998, must be, and it hereby is, vacated.

IV.

Having found that the initial agreed dismissal order that effectuated the parties' Settlement Agreement was properly entered by the district court, and that the district court erred in altering the parties' Settlement Agreement, we must now determine the disposition of this case.

The Underwriters argue that the district court was correct in enforcing the underlying Settlement Agreement and that the agreed order remains in full force and effect.

Columbus-America asserts that following the district court's order of July 1, 1998, the Settlement Agreement cannot be enforced and the parties should be returned to their pre-settlement status. Its argument that the Settlement Agreement does not bar future claims on behalf of the Underwriters is not well taken, as we have demonstrated above. It is not possible for the Underwriters and Columbus-

America to have agreed that there would be no future claims by anyone else to the treasure, and the agreement could not be so construed. Any future claim made to anything salvaged from the Central America by a claimant other than the Underwriters would have to be decided at that time. In that respect, we note that Columbus-America is already protected to what would seem to be the fullest extent possible by the orders entered in this case by the court. The district court's order of August 18, 1989 is yet in effect, and it provides, among other things: that Columbus-Americas the first salvor and is entitled to salvage the Central America without interference; that it has a substantive right to enjoin interference by others; that any person having notice of the order is permanently enjoined and restrained from conducting search, survey or salvage operations, etc., with respect to the Central America, and within delineated latitude and longitude boundaries in the North Atlantic.

The order of the district court filed April 3, 1990, which is yet in effect, provides that the proceeding is closed to the filing of additional claims by any person to the Central America or any items recovered therefrom, whether such items be recovered prior to the order or subsequent to it, and that all claims after April 3, 1990 are ordered foreclosed.

Those orders of the district court are enforceable by it either by order, injunction or contempt proceeding, if appropriate, and Columbus-America has received all of the protection a court could give it absent actual claims against the Central America or salvage from that ship.[5] There having been no

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[5] The district court can enforce and punish willful violations of its order with its contempt powers. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 693 n.32,

such claims, we cannot give any advisory opinion as to the disposition of any which might be made.

That being true, we take notice in the reply brief of Columbus-America at page 15 that it "has no desire to prolong litigation. If there is in fact a way to make certain no others have any claim whatsoever to future recoveries, the concepts embodied in the June 23rd order might provide an appropriate basis for resolution of the case."

We are of the opinion that Columbus-America has been given all the protection it can be given consistent with due process and the previous opinion of this court in this case in 974 F.2d 450 (4th Cir. 1992).

We thus, on remand, require the district court to re-enter its Dismissed Agreed order previously entered June 23, 1998.

V.

Columbus-America also appeals the order of the district court unsealing the list of the inventory of the recovered treasure.

The evidence before the district court which supported the

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modified, *Washington v. United States*, 444 U.S. 816 (1979) ("[A] court possessed of the res in a proceeding in rem. . .may enjoin those would interfere with that custody."); *Marex International, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp 825, 829-30 (S.D. Ga. 1997) (granting salvor exclusive rights to salvage wreck and enjoining all third parties from interfering with those rights); *United States v. Crookshanks*, 441 F. Supp. 268, 270 (D. Or. 1977) (finding that court could hold third parties in contempt to enforce in rem injunction).

sealing of the inventory was that making the same public could substantially damage the ultimate value received for the antique gold. There is no evidence before us that this condition has changed. When the Settlement Agreement is made effective by virtue of this decision, a specific part of the treasure in kind will be the property of the Underwriters and the balance of the treasure in kind will be the property of Columbus-America. When our decision is final, the Underwriters and the balance of the treasure in kind will be the property of Columbus-America. When our decision is final, the Underwriters may do with their share of gold whatever they want by way of advertising, sale or otherwise, and Columbus-America may do with the balance of the treasure as it wants by way of advertising, sale or otherwise. But the fact remains that the record in this case is that the value of the inventory may be damaged by premature release of the inventory. That being true, so much of the record in this case as reveals the items of treasure which are the property of Columbus-America will remain under seal, and the Underwriters may not disclose it. But the seal of the court is lifted as to the items of treasure in the hands of the Underwriters.

We are aware that there is a common law as well as a constitutional right to have court records made public. Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case. So we are aware that the record of the inventory will have to be made public, but not presently, over the objection of Columbus-America, it being the owner of at least 90% of the treasure involved. We are confident that future motions in

that respect will receive due consideration in the district court.

VI.

Columbus-America submits that the panel majority opinion in Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993), applied a test for abandonment inconsistent with traditional maritime law. Columbus-America argues that we should adopt the dissenting opinion's abandonment test and overrule the prior panel's judgment under exceptions to the law of the case doctrine. After examination of the cases cited by Columbus-America, we agree that the majority's abandonment test was rejected by two other courts of appeal, the Ninth Circuit in Deep Sea Research, Inc. v. The Brother Jonathan, 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 118 S. Ct. 1464 (1998),[6] and the Sixth Circuit in Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded on other grounds, 118 S. Ct. 1558 (1998)[7] The Supreme Court, however, did not define

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[6] On remand, the Ninth Circuit vacated the judgment in its entirety except for the assumption of jurisdiction and remanded the case to the district court. Deep Sea Research, Inc. v. Brother Jonathan, 143 F.3d 1299 (9th Cir. 1998). We are not aware of any subsequent proceedings in the case.

[7] On remand, the Sixth Circuit revised its prior opinion regarding the abandonment test. Fairport International Exploration, Inc. v. The Shipwrecked Vessel, known as the Captain Lawrence, 177 F.3d 491 (6th Cir.), reh'g denied, (1999). While it held that "a State may prove by inference that a shipwreck last owned by a private party is "abandoned,"

abandonment when it reviewed Brother Jonathan. California v. Deep Sea Research, Inc., 118 S. Ct. 1464, 1473 (1998) (leaving the issue of whether the Brother Jonathan was abandoned under the Abandoned Shipwreck Act for reconsideration on remand). The Court either declined to or simply did not resolve the conflict between the Sixth, Ninth, and Fourth circuits regarding the test for abandonment and instead remanded "with the clarification that the "meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." California v. Deep Sea Research, Inc., 528 U.S. 491, 508 (1998).

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618 (1983). Even under this instruction to adhere to earlier decisions of law in a case, the doctrine is a rule of discretion, not a jurisdictional requirement. See Smith v. Bounds, 813 F.2d 1299, 1304 (4th Cir. 1987). Under certain conditions the exceptions to the law of the case doctrine allow a panel of the court to change a prior ruling in the same case. See United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999) ("Under law of the case doctrine...the decision of an appellate court establishes the law of the case [and] it must be followed in all subsequent proceedings in the same case...unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable

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Fairport, 177 F. 3d at 500, it qualified that rule: "[W]e choose to view length of time as one factor among several relevant to whether a court may infer abandonment...[but] [w]e agree that lapse of time, alone, does not necessarily establish abandonment...." Fairport, 177 F.3d at 499 (citation omitted).

to the issue, or (3) the prior decision was clearly erroneous and would work a manifest injustice." (internal quotations omitted)(citation omitted)); Maryland Cas. Co. v. City of South Norfolk, 54 F.2d 1032, 1039 (4th Cir. 1932) ("[W]hile we have the power on a subsequent appeal to reverse [the law of the case], we exercise [it] only in the most unusual circumstances...").

A comparison of our earlier decision in this case in 974 F.2d 450 with the decision of the Supreme Court and the Ninth Circuit in The Brother Jonathan and the Sixth Circuit in Fairport indicates that the rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in Brother Jonathan. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question as the above quotation from Deep Sea Research (Brother Jonathan) indicates. Our en banc court has declined to reexamine our panel holding in 974 F.2d 450 as to the proof necessary for abandonment, although two members of the panel favored reexamination. In such event, we do not believe that the circumstances exist for a panel to change the decision of the previous panel and that that subject is better addressed by an en banc court. Cf. Oman v. Johns Mansville Corp., 764 F.2d 224, 226-27 (4th Cir. 1985).

VII.

To summarize, the order of the district court filed July 1, 1998 changing the Settlement Agreement and vacating a part of the Dismissed Agreed order filed June 23, 1998 is vacated. The Dismissed Agreed order previously filed June 23, 1998 is reinstated. The order of the district court unsealing the

inventory of the treasure is affirmed so far as it concerns the treasure in the hands of the Underwriters, but is reversed so far as it concerns the
inventory of the treasure in the hands of Columbus-America. The argument of Columbus-America that we adopt the dissenting opinion in this case in 974 F.2d 450 (4th Cir. 1992) is denied, that being left to an en banc court.

The parties will pay their own costs.

AFFIRMED IN PART,

VACATED IN PART,

REVERSED IN PART, AND

REMANDED WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 90-2730 to 90-2732

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF
NEW YORK; HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellants,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees

33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be the S.S Central America), *in rem*,

Defendant,

CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL

INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS;
THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

HARRY G. JOHN; JACK F. GRIMM,

Plaintiffs-Appellants,

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiff,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED;

ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY;

ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONTDOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

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Defendant,

AMERICAN INSTITUTE OF MARINE UNDERWRITERS;
THE BOARD OF UNDERWRITERS OF NEW YORK,
Amici Curiae.

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Plaintiff-Appellant,

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY;

WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

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37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be the S.S. Central America), *in rem*,

Defendant.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS; THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

Argued June 5, 1991

Decided Aug. 26, 1992

Douglas A. Jacobsen, Bigham, Englar, Jones & Houston, John H. Reilly, Jr., Dickerson & Reilly, Edward A. Friedman, Friedman & Kaplan, New York City, Guilford D. Ware , Crenshaw, Ware & Martin, Norfolk, Va., argued (Marilyn L. Lytle, George R. Daly, Bigham, Englar, Jones & Houston, Robert D. Kaplan, Friedman & Kaplan, New York City, James L. Chapman, IV, Crenshaw, Ware & Martin, Norfolk, Va., Daniel R. Warman, John Y. Richardson, Jr., Williams, Worrell, Kelly, Greer & Frank, Norfolk, Va., on brief), for appellants.

Richard T. Robol, Hunton & Williams, Norfolk, Va., Robert W. Trafford, Porter, Wright, Morris & Arthur, Columbus, Ohio, argued (Kevin J. Cosgrove, Robert M. Tata, Stephen W. Haynie, Hunton & Williams, Norfolk, Va., Curtis A. Loveland, William J. Kelly, Jr., Daniel F. Gourash, Porter, Wright, Morris & Arthur, Columbus, Ohio, on brief), for

appellee.

Allan S. Reynolds, Reynolds, Smith & Winters, Norfolk, Va., for amici curiae.

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

OPINION

DONALD RUSSELL, Circuit Judge:

"When Erasmus mused that '[a] common shipwreck is a source of consolation to all', *Adagia*, IV.iii.9 (1508), he quite likely did not foresee inconcinnate free-for-alls among self-styled salvors." *Martha's Vineyard Scuba HQ, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1061 (1st Cir.1987). Without doubt the Dutch scholar also could not imagine legal brawls involving self-styled "finders" from Ohio, British and American insurance underwriters, an heir to the Miller Brewing fortune, a Texas oil millionaire, an Ivy League university, and an Order of Catholic monks. Yet that is what this case involves, with the prize being up to one billion dollars in gold.

This gold was deposited on the ocean floor, 8,000 feet below the surface and 160 miles off the South Carolina coast, when the S.S CENTRAL AMERICA sank in a hurricane on September 12, 1857. The precise whereabouts of the wreck remained unknown until 1988, when it was located by the Columbus-America Discovery Group ("Columbus-America"). This enterprise has since been recovering the gold, and last year it moved in federal district court to have itself declared the owner of the treasure. Into court to oppose this manoeuvre came British and American insurers who had originally underwritten the gold for its ocean Voyage and then had to pay off over a million dollars in claims upon the

disaster. Also attempting to get into the stew were three would-be intervenors who claimed that Columbus-America had used their computerized "treasure map" to locate the gold. The district court allowed the intervention, but it did not give the intervenors any time for discovery.

After a ten-day trial, the lower Court awarded Columbus-America the golden treasure in its entirety, 742 F. Supp. 1327. It found that the underwriters had previously abandoned their ownership interests in the gold by deliberately destroying certain documentation. As for the intervenors, the Court held that there was no evidence showing that Columbus-America used their information in any way in locating the wreck.

Upon appeal, we find that the evidence was not sufficient to show that the underwriters affirmatively abandoned their interests in the gold. We also hold that once intervention was allowed, the district court abused its discretion by not affording the intervenors sufficient time for discovery. We therefore reverse the decision below and remand the case for further proceedings.

I.

A.

The year 1857 is justly famous in American history for its many notable events. Among these was the beginning of a fairly serious financial decline, the aptly named Panic of 1857. Associated with the Panic, and another reason why the year is so famous, is one of the worst disasters in American maritime history, the sinking of the S.S. CENTRAL AMERICA.

The CENTRAL AMERICA was a black-hulled, coal-fired, three-decked, three-masted sidewheeler with a cruising speed

of eleven knots. Built in 1852, and launched the following year, she carried passengers, mail, and cargo between Aspinwall, Columbia (on the eastern end of the isthmus of Panama), and New York City, with a stopover in Havana. Most, if not all, of her passengers were headed to or from California, the route being one leg of the then quickest way between the west coast and the eastern seaboard-from California to the western end of the isthmus of Panama aboard a steamship, across the isthmus on the Panama Railroad, and then from Aspinwall to New York aboard another steamship. Owned by the U.S. Mail and Steamship Company and originally named the S.S. GEORGE LAW (until June 1857), the CENTRAL AMERICA completed forty-three voyages between Panama and New York in her four years of operation. During this period, the California gold rush was in full swing, and it has been said that the ship carried one-third of all gold shipped at that time from California to New York.

In August of 1857, over four hundred passengers and approximately $1,600,000 (1857 value) in gold (exclusive of passenger gold) left San Francisco for Panama aboard the S.S. SONORA. Many of the passengers were prospectors who had become rich and were returning home, either for good or to visit. Also on board were California Judge Alonzo Castle Monson, who resigned from the bench after losing his house and all his money in a famous poker game, and Mrs. Virginia Birch, a.k.a. "the notorious Jenny French," a former dance hall girl well known in San Francisco. As for the gold, it was being shipped by California merchants, bankers, and express companies, including Levi Straus and Wells Fargo, to New York banks, the banks wanting specie to stave off the effects of the financial downturn.

The travellers and the cargo reached Panama without incident, and they crossed the isthmus by rail. On September

3, over six hundred people came aboard the CENTRAL AMERICA, as well as $1,219,189 of the gold shipped on the SONORA, the remainder being shipped to England aboard a different vessel. The CENTRAL AMERICA first headed for Havana, which was reached on September 7. There, the ship lay over for a night, and some of the passengers debarked to catch another vessel for New Orleans. On September 8, under clear skies, the CENTRAL AMERICA left Havana for New York, carrying approximately 580 persons and her golden treasure.

On the second day out of Havana, the weather changed and a mighty storm came up. What the passengers and crew could not know was that they were headed directly into the teeth of a ferocious hurricane. As the storm worsened around the CENTRAL AMERICA, a leak developed and soon water was rushing into the boat. The water extinguished the fires in the ship's boilers, and this in turn caused the ship's pumping system to fail. All able male passengers began a systematic bailing of water out of the ship, but it was to no avail; after thirty frantic hours, the boiler fires would still not light and the water level continued to rise.

Knowing the situation was hopeless, Captain William Lewis Herndon managed to hail a passing ship, the brig MARINE, and one hundred persons, including all but one of the women and children aboard, were safely transferred to the other ship. Time and conditions would not allow for any more transfers, however, and shortly after 8 p.m. on September 12, the CENTRAL AMERICA began making its quick descent to the bottom of the ocean.

After being flung into the sea, many of the men managed to come to the top and float there, desperately holding onto any buoyant material available. Six to nine hours after the sinking, fifty of these men were rescued by the Norwegian

bark ELLEN. Earlier, a small bird had thrice circled the ELLEN and flown directly into the face of the ship's captain. Taking this as a sign, the captain changed his course to follow from whence the bird had come, and in so doing discovered the fifty floating survivors. Three other men were also rescued when, nine days later and 450 miles away, a ship spotted their lifeboat, which had been riding the Gulf Stream.

In all, 153 persons were rescued, while approximately 425 lost their lives. Also lost were hundreds of bags of mail and the $1,219,189 in gold. At the time, there were rumors that other commercial shipments of gold were aboard, but these were quickly discounted. It is true, though, that a significant amount, probably several hundred thousand dollars worth (1857 valuation), of passenger gold was lost. Many passengers had with them their earnings from several years' labor in the California gold fields. Some kept this gold on their person, while others carried it in carpetbags or trunks. Also, passenger gold could have been checked with the ship's purser, although these records were lost with the ship. Captain Thomas W. Badger is one example of a passenger carrying gold, he having lost $17,500 of it stored in a carpet-bag. Also, the newspapers reporting the disaster contained vivid accounts of men flinging down their hard earned treasure in disgust upon realizing their impending doom.

Needless to say, for the next several weeks newspapers around the country devoted much space to the disaster which befell the CENTRAL AMERICA. While people mourned the over four hundred persons who had valiantly lost their lives, they also feared that the loss of such a large amount of specie would exacerbate the country's already serious financial situation. The commercial shipments of gold had been insured, though, and the insurance underwriters began advertising in the newspapers that they would pay off their

commitments upon the proper proofs being presented. Approximately one-third of the treasure had been underwritten by New York insurers while the rest was underwritten in London. Without doubt, most, if not all, of the claims were promptly paid off by the underwriters.

Under applicable law, then and now, once the underwriters paid the claims made upon them by the owners of the gold, the treasure became theirs. Thus, less than two weeks after the disaster, the underwriters began negotiating with the Boston Submarine Armor Company about possibly raising the ship and her cargo. Also, on June 28, 1858, two of the underwriters (Atlantic Mutual Insurance Company and Sun Mutual Insurance Company) contracted with Brutus de Villeroi, a Frenchman then living in Pennsylvania, to salvage the gold. The contract states that de Villeroi, "by means of his Invention of a Submarine boat" and at his own expense, would raise the treasure and receive a salvage award of seventy-five percent. At this time, though, no one was quite sure where the boat had gone down, or in how deep of water. At first, some estimated the ship was in only twenty-eight fathoms of water (168 feet), when in fact it was over 8,000 feet below the surface. As would be expected, nothing came of the salvage attempts in the late 1850's, and the issue, and the gold, would lay dormant for over a hundred and twenty years.

B.

Beginning in the 1970s, a number of individuals and groups began discussing and planning the salvage of the CENTRAL AMERICA, as the decade before had seen a great advance in the technology necessary for deep sea salvage. Still, though, no one was positive where the ship had gone down or in what depth of water. At least one group thought they had found her in shallow water fifteen miles off Cape Hatteras, while in

reality was at least one hundred miles from where she actually lay.

A number of those interested in salvaging the CENTRAL AMERICA contacted some of the various insurers who had underwritten the gold. The would-be salvors hoped to receive a relinquishment of the insurers rights to the property, or at least form a salvage contract with the underwriters. While the underwriters negotiated with several groups about the salvage, they did not enter into any salvage contracts nor did they relinquish any of their rights to the gold.

One of the groups that contacted several of the underwriters was Plaintiff Columbus-America Discovery Group, the eventual salvor. Columbus-America asked the underwriters to convey to it any claims they might have regarding the gold, but this was not done.

Another group that was interested in salvaging the gold was Santa Fe Communications, Inc. ("Santa Fe"), whose interests are now owned by Plaintiff-Intervenors Harry G. John and Jack R. Grimm.[1] In 1984, Santa Fe paid Plaintiff-Intervenor Columbia

University $300,000 for Columbia's Dr. William B.F. Ryan to conduct a sonar search over a 400 square mile area of the Atlantic Ocean. During his sonar search, Dr. Ryan identified seven "targets" on the ocean floor. Of these targets, he found only one, target #4, to be a good candidate for being the CENTRAL AMERICA. Dr. Ryan felt that "this target is almost certainly the scattered debris of a shipwreck," and his report mentioned that further exploration of it would have

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[1] John is an heir to the Miller Brewing Company, while Grimm is a multi-millionaire Texas oilman who has in the past led searches for Noah's Ark, the Lock Ness Monster, and the TITANIC.

been made but for "gale force winds and seas." In conclusion, he told Santa Fe, "you [Harry John] and Mr. Jack Grimm have a likely candidate for further exploration."

Santa Fe, though, did not further pursue the matter, and on December 31, 1984, it transferred to a Catholic monastic order, the Province of St. Joseph of the Capuchin Order-St. Benedict Friary of Milwaukee, Wisconsin ("the Capuchins"), any and all rights and interests arising out of its undersea salvage operations. It now appears that target #4 was indeed the CENTRAL AMERICA.

The contract between Santa Fe and Columbia provided that Columbia would be able to freely publish the results of the sonar survey, but only after keeping such results confidential for a year. Shortly after the survey, Columbus-America President Thomas Thompson began contacting Dr. Ryan and others at Columbia and Santa Fe in an attempt to learn the results. Over a two-year period, Thompson and Dr. Ryan had a number of conversations about the techniques for identifying sonar images on the Ocean floor, but the latter only believed that Thompson, who was associated with the prestigious Battelle Memorial Institute, was interested in this information from a scientific standpoint.

On February 12, 1986, Thompson wrote Dr. Ryan and requested certain sonar photographs taken during the survey. The letter also stated, "I am submitting this order primarily out of personal interest. I have a personal source of funds available for data collection and correlation-type work. I am also interested in the techniques for separating anomalies from their environment and in the processing of specific anomalies to determine their character." Dr. Ryan passed along Thompson's request to Columbia, which agreed to provide the information. As a condition, though, Columbia told Thompson that since the data you requested is not in the

public domain, we would require your agreement that any photo-copied records or computer tapes you receive would be for your sole use and would not be reproduced for others." Thompson agreed to this condition, but went ahead and placed the information he received into Columbus-America's files.

C.

In 1987, after much effort and expense, Columbus-America believed it had found the CENTRAL AMERICA. Thus, on May 27, 1987, it filed, in the United States District Court for the Eastern District of Virginia, an *in rem* action against the wreck, alleging that, under the law of finds, it was its "finder," or, alternatively, under the law of salvage, its "salvor." Columbus-America then asked for and received, on July 17, 1987, a preliminary injunction enjoining the other would-be salvors from operating within a specified area ("injunction box #1") of the sea. Injunction box #1 covered an area which was approximately thirty miles from Dr. Ryan's target #4.

After receiving this injunction, Columbus-America spent two years attempting to salvage the wreck they thought was the CENTRAL AMERICA—this time was also spent battling the other would-be salvors in court. Plaintiffs recovered several artifacts, as well as a good many lumps of coal, but at some point they recognized that they were salvaging the wrong ship. They then began to look at other likely targets, and, eventually, they discovered the right ship. Thus, Columbus-America requested the Court to grant them, by permanent injunction, exclusive control over the area around this new find, and this was done through an Order entered on August 18, 1989 ("injunction box #2"). Within the area of injunction box #2 was Dr. Ryan's target #4.

Since 1989, Columbus-America, through its invention of a submersible robot which can pick up objects ranging from small gold coins to a ship's anchor weighing thousands of pounds, has been salvaging objects left on the ocean floor by the CENTRAL AMERICA. Undoubtedly, its major interest is in recovering the gold, and so far several hundred million dollars worth (present value) of gold coins, ingots, and bars have been recovered-it is estimated that the total haul may be worth up to one billion dollars.

On September 29, 1989, many of the original underwriters of the gold, plus the Superintendent of Insurance of the State of New York for several insurance companies now defunct, filed claims with the district court asserting that they were the proper owners of the gold. After this, extensive discovery was had, and the case was scheduled for trial beginning April 3, 1990.

Three days before trial, John and Grimm moved to intervene, as did Columbia two days later. The intervenors claimed that Columbus-America must have used the information from Dr. Ryan's sonar survey in locating the CENTRAL AMERICA, and thus they wished for a percentage of the recovery. Two weeks earlier, John had bought back for $10 any claims the Capuchins would have on the CENTRAL AMERICA. When Santa Fe had originally donated their rights to the monks in 1984, the Capuchins recognized the gift as worthless, and John did nothing to enlighten them on the discovery of the ship or the upcoming trial. After later realizing what John was up to, though, the monks must have protested, for on April 10 both John and Grimm signed an agreement with the Capuchins giving the Order one-third of any judgment they (John or Grimm) would recover.

The district court allowed John, Grimm, and Columbia to intervene, but it permitted them no discovery-the Court wanting the trial to begin as scheduled. Earlier, the Court had bifurcated the trial, so that the first part would concern only whether Columbus-America was entitled to finder or salvor status. If the district court found that the insurance companies had somehow abandoned the gold, Columbus-America would be considered its "finder," and thus its owner. On the other hand, if the underwriters had not abandoned the gold, they would still remain its owners and Columbus-America would be its "salvor." If the latter scenario were found to be true, a second phase of the trial would be necessary, wherein the Court would have to determine what each underwriter had insured and the amount of Columbus-America's salvage award. Because the trial had been bifurcated, the intervenors wanted their claims adjudicated after the finder/salvor issue was decided. The Court, though, would allow intervention only if the would-be intervenors agreed to have their claims adjudicated at the same time as the finder/salvor issue—that is, beginning the next day.

The trial began on schedule, lasted ten days, and received much national attention. Over its course, many witnesses appeared and hundreds of exhibits were entered into evidence. The parties then began an anxious wait for a decision.

On August 14, 1990, the Court found for Columbus-America on all the issues, dismissing the claims of the underwriters, Columbia, John, and Grimm. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* 742 F.Supp. 1327 (E.D. Va. 1990). On the finder/salvor issue, the district court held that the underwriters had abandoned the gold, and thus Columbus-America was its finder and sole owner. The Court based this finding of abandonment primarily on the supposed fact that the underwriters had *intentionally* destroyed any

documentation they had once had concerning the case. *Id.* at 1344-48. As for the intervenors, the Court found that they failed to prove that the information furnished Thompson could have assisted in locating the ship, that Columbus-America used this information in anyway, or "even if the information was of value and was used, that any such use would entitle them to share in any recovery." *Id.* at 1341.

The underwriters and the intervenors now appeal.

II.

A.

Historically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their owners. Under this law, the original owners still retain their ownership interests in such property, although the salvors are entitled to a very liberal salvage award. Such awards often exceed the value of the services rendered, and if no owner should come forward to claim the property, the salvor is normally awarded its total value. On salvage generally, see 3A M. Norris, *Benedict on Admiralty: The Law of Salvage* (7th ed. rev. 1991).

A related legal doctrine is the common law of finds, which expresses "the ancient and honorable principle of 'finders, keepers.'" *Martha's Vineyard,* 833 F.2d at 1065. Traditionally, the law of finds was applied only to maritime property which had never been owned by anybody, such as ambergris, whales, and fish. 3A *Benedict* on Admiralty § 158, at 11-15. A relatively recent trend in the law, though, has seen the law of finds applied to long lost and abandoned shipwrecks. *Id.* § 158, at 11-16 to 11-18.

Courts in admiralty favor applying salvage law rather than the law of finds. As has been succinctly stated by Judge Abraham D. Sofaer:

> The law of finds is disfavored in admiralty because of its aims, its assumptions, and its rules. The primary concern of the law of finds is title. The law of finds defines the circumstances under which a party may be said to have acquired title to ownerless property. Its application necessarily assumes that the property involved either was never owned or was abandoned. . . To justify an award of title (albeit of one that is defeasible), the law of finds requires a finder to demonstrate not only the intent to acquire the property involved, hut also possession of that property, that is, a high degree of control over it.
>
> These rules encourage certain types of conduct and discourage others. A would-be finder should be expected to act acquisitively, to express a will to own by acts designed to establish the high degree of control required for a finding of possession. The would be finder's longing to acquire is exacerbated by the prospect of being found to have failed to establish title. If either intent or possession is found lacking, the would-be finder receives nothing; neither effort alone nor acquisition unaccompanied by the required intent is rewarded. . . . Furthermore, success as a finder is measured solely in terms of obtaining p05session of specific property; possession of specific property can seldom be shared, and mere contribution by one party to another's successful efforts to obtain possession earns no compensation.
>
> Would-be finders are encouraged by these rules to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property.

Hener v. United States, 525 F.Supp. 350, 356 (S.D.N.Y. 1981).

In sharp contrast to "the harsh, primitive, and inflexible nature of the law of finds" is the law of salvage.

> Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law. The primary concern of salvage law is the preservation of property on oceans and waterways. Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.
>
> Salvage Law assumes that the property being salved is owned by another, and thus that it has not been abandoned. Admiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways; in fact, property may not be "salvaged" under admiralty law unless it is in some form of peril.
>
> Salvage law requires that to be a salvor a party must have the intention and the capacity to save the property involved, but the party need not have the intention to acquire it. Furthermore, although the law of salvage, like the law of finds, requires a salvor to establish possession over property before obtaining the right to exclude others,

> "possession" means something less in salvage law than in finds law. In the salvage context, only the right to compensation for service, not the right to title, usually results; "possession" is therefore more readily found than under the law of finds. . . Moreover, unlike the would-be finder, who is either a keeper or a loser, the salvor receives a payment, depending on the value of the service rendered, that may go beyond quantum meruit. Admiralty's equitable power to make an award for salvage-recognized since ancient times in maritime civilizations-is a corollary to the assumption of nonabandonment and has been applied irrespective of the owner's express refusal to accept such service.
>
> These salvage rules markedly diminish the incentive for salvors to act secretly, to hide their recoveries, or to ward off competition from other would-be salvors. . . . In short, although salvage law cannot alter human nature, its application enables courts to encourage open, lawful, and cooperative conduct, all in the cause of preserving property (and life).

Id. at 357-58; *see also* 3A *Benedict on Admiralty* § 158, at 11-15 to 11-16.

Today, finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners. Abandonment in this sense means much more than merely leaving the property, for it has long been the law that "[w]hen articles are lost at sea the title of the owner in them remains. *THE AKABA*, 54 F. 197, 200 (4th Cir. 1893); *see also* 3A *Benedict on Admiralty* § 158, at 11-1 to 11-2; *Hener*, 525 F. Supp. at 357; *Wilkie, et al. v. Two Hundred and Five Boxes of Sugar*, 29 F.Cas. 1247 (D.S.C. 1796) (No.17,662). Once an article has been lost at sea, "lapse of time and nonuser are not sufficient, in and of

themselves, to constitute an abandonment." *Wiggins v.1100 Tons, More or Less, of Jialian Marble,* 186 F. Supp. 452, 456 (E.D. Va. 1960); *see also Wilkie,* 29 F.Cas. at 1247 (length of time does not divest an original owner of his derelict property at sea). In addition, there is no abandonment when one discovers sunken property and then, even after extensive efforts, is unable to locate its owner. *Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain,* 478 F. Supp. 973, 975 (E.D. La. 1979).

While abandonment has been simply described as "the act of deserting property without hope of recovery or intention of returning to it," *Nunley V. M/V DAUNT-LESS COLOCOTRONIS,* 863 F.2d 1190, 1198 (5th Cir. 1989), in the lost property at sea context, there is also a strong *actus* element required to prove the necessary intent. *Zych v. The Unidentified, Wrecked and Abandoned Vessel,* 755 F. Supp. 213, 214 (N.D. Ill. 1990); *THE NO. 105,* 97 F.2d 425, 426 (5th Cir. 1938). "Abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership." *THE PORT HUNTER,* 6 F. Supp. 1009, 1011 (D. Mass. 1934). The proof that need be shown must be "strong . . ., such as the owner's express declaration abandoning title." T. Schoenbaum, *Admiralty and Maritime Law* § 15-7, at 512 (1987); *Hener,* 525 F. Supp. at 357; 3A *Benedict on Admiralty* § 158, at 11-16; *see also Brady v. The Steamship AFRICAN QUEEN,* 179 F. Supp. 321, 324 (ED Va. 1960) (the law of finds should be applied only in "extreme cases where the property is wholly derelict and affirmatively abandoned by the owners and the underwriters"); and *Zych,* 755 F. Supp. at 214 ("A finding of abandonment must be supported by strong and convincing evidence").

There are only a handful of cases which have applied the law of finds, all of which fit into two categories. First, there are cases where owners have expressly and publicly abandoned their property. *See, e.g., Nunley,* 863 F.2d at 1199; *State ex rel. Ervin v. Massachusetts Co.,* 95 So.2d 902 (Fla. 1956), *cert. denied,* 355 U.S. 881, 78 S.Ct.. 147, 2 L.Ed.2d 112 (1957); *Nippon Shosen Kaisha, K.K. v. United States,* 238 F. Supp. 55 (N.D.Cal. 1964); *Brady,* 179 F. Supp. at 322. In the second type of case, items are recovered from ancient shipwrecks and no owner appears in court to claim them. Such circumstances may give rise to an inference of abandonment, but should an owner appear in court and there be no evidence of an express abandonment, the law of salvage must be applied. We agree with the author of *Admiralty and Maritime Law* that:

> In the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property, or there may even be an express disclaimer of ownership. This calls for the application of the law of finds. By contrast, parties who intend to assert a claim of ownership may be identified. In such a case the law of salvage is applied.

§ 15-7, at 514 (footnotes omitted); *see also Hatteras, Inc.v. THE U.S.S. HATTERAS,* 1984 A.M.C. 1094, 1097 n. 5 (S.D. Tex. 1981) ("While mere nonuse of property and lapse of time without more do not establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon").

The case below appears to be the only reported decision involving salvaged treasure from ancient shipwrecks wherein a court has applied the law of finds despite the fact that the

previous owner appeared in court. In all other finds law cases, no prior owner has appeared. One example is the *Treasure Salvors* set of cases, all of which involved the salvage of Spanish treasure ships sunk off the Florida Keys in 1622. Widely quoted is the Fifth Circuit's phrase that "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 337 (5th Cir. 1978). Yet the Court there also took the trouble to note that it had been stipulated by all parties involved that the original owners had abandoned the wrecks, and the district court also made mention of the fact that, "The modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor-owner." *Id.* at 336 n. 9; *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* 556 F.Supp. 1319, 1334 n. 2 (S.D. Fla. 1983). Another Spanish wreck, this time from the 1715 Plate Fleet, was involved in *Cobb Coin Co., Inc. v. The Unidentified, Wrecked* and *Abandoned Sailing Vessel,* 525 F.Supp. 186 (S.D. Fla. 1981), and there the Spanish government again made no claim of ownership.

In *Martha's Vineyard, supra,* which concerned the salvage of the S.S. REPUBLIC, a ship that "plummeted to a watery grave in 1909," the First Circuit made it a point to state that, "After petitioner brought its action in *rem* in the district court, no person or firm appeared to assert any overall claim of ownership." 833 F.2d at 1065. Likewise *Massachusetts V. Maritime Underwater Surveys, Inc.,* 403 Mass. 501, 531 N.E.2d 549 (1988), which involved salvage of "the notorious pirate ship WHYDAH," a vessel that sank in a storm off Cape Cod in April of 1717. There, the Supreme Judicial Court of Massachusetts noted that "American courts have applied the law of finds, rather than the law of salvage, in cases involving

ancient ship-wrecks where no owner is likely to come forward," *id.* 531 N.E.2d at 551, apparently after descendants of the illfated pirates made no attempt to rush into court and claim the booty.[2]

An example of a treasure salvage case where the original owner, or its successor in interest,[3] appeared and salvage law was applied is *Zych, supra.* In this case, the LADY ELGIN sank in 1860 on Lake Michigan, and claims were paid on the vessel and its cargo by Aetna Insurance Company. Because of the recent advances in technology necessary for deep water salvage, an independent salvor located the ship in the late 1980s and he, claiming finder status, attempted to have the district court declare him the owner.

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[2] The other reported cases where no owner appeared and the law of finds was applied are *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel,* 758 F.2d 1511 (11th Cir, 1985) (Eighteenth Century English vessel); *Wiggins, supra,* Norwegian bark carrying Italian marble which sank in 1894, *Rickard v. Pringle*, 293 F.Supp. 981 (E.D.N.Y. 1968) (propeller from a 1902 shipwreck); *Chance v. Certain Artifacts Found and Salvaged From the NASHVILLE a/k/a the RATTLESNAKE,* 606 F.Supp. 801 (S.D.Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (privately owned Confederate pirate ship sunk in 1863); and *Indian River Recovery Co. v. THE CHINA*, 645 F.Supp. 141 (D.Del. 1986) (Nineteenth Century vessel).

[3] Throughout our case, Columbus-America has made numerous mentions of the fact that the insurance underwriters are not the "original" owners of the gold, but rather assumed their ownership interests through subrogation. While Columbus-America appears to want the insurers to possess only some time of second-class ownership interest in the gold, this is clearly not the law. Absent abandonment, insurance underwriters, or even those to whom the underwriters assign their interests—see, e.g., *Zych, supra*—retain the same interests as the "original owners.

This claim was disputed by the Lady Elgin.

Foundation, to which Aetna's successor, CIGNA, had transferred its ownership interests in the wreck in April of 1990. The court, after noting "the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence," found that the vessel had not been abandoned. Aetna's successor in interest, the Lady Elgin Foundation, still retained its ownership interest, and the law of salvage, not finds, was applied. As for the 130 years during which no salvage was attempted, the court found that "Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success." 755 F. Supp. at 216.

In maintaining the position that previous owners can abandon sunken vessels even without any affirmative acts, Columbus-America relies especially on two state supreme court cases decided before the Civil War, *Eads v. Brazelton,* 22 Ark. 499 (1861) and *Wyman v. Hurlburt,* 12 Ohio 81 (1843). *Eads* involved the steamboat AMERICA which partially sank in the Mississippi River in 1827. The boat contained much valuable property, and in the two weeks after its sinking the owners conducted salvage operations in which they rescued all of the fur and government-owned specie on board, as well as one-half of the six hundred pigs of lead and a portion of the shot. Also, all of the machinery of the ship, including the boilers, was successfully removed. After this salvage, the owners physically abandoned the wreck and two years later an island began forming about it, on which trees would eventually grow to a height of thirty or forty feet.

The actual case concerned which of two would-be finders/salvors owned the remaining pigs of lead. As for the original owners, the Court declared that the cargo had been

abandoned and then, in dicta, noted that "in extreme cases property wholly derelict and abandoned has been held to belong to the finder against the former owner." *Id.* at 509. Such was not the case here, though, for the former owners made no attempt to claim an ownership interest in the lead.[4] Because the boat and its contents were partially salvaged shortly after the wreck, the remaining cargo was easily salvageable for at least two years thereafter, and, most importantly, the original owners made no claim to the property once the remaining lead was salvaged, we find *Eads* inapposite.

The facts of *Wyman* are more on point, although we doubt its precedential value. There, a schooner, THE G.S. WILLIS, sank in Lake Erie during the fall of 1835. The next year it was raised by another party and $865 in specie was discovered in the cabin. Truman Wyman, the original owner of this money, then filed an action of trover in Ohio state court against the finders/salvors. The case was tried before a jury in the Supreme Court of Ashtabula County, and they returned a special verdict which included the finding that "at the time the said schooner was seized by the defendants, the same was abandoned by the plaintiff, and that said schooner was, on the day and year aforesaid, derelict property, and when found in the bottom of the Lake was worth nothing." 12 Ohio at 85.

A majority of the Ohio Supreme Court held for the finders/salvors, awarding them the entire amount. The Court based this decision on the jury's finding of abandonment, which the majority supposed was intended "to be understood that all hope, expectation, and intention to recover the

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[4] In fact, the only person originally connected with THE AMERICA who was mentioned by the Court, its Captain, Swan, far from claiming any ownership interest in the boat, actually supplied information to one of the salvors as to the location of the wreck.

property were utterly and entirely relinquished." *Id.* at 86-87. A seventy-two word dissenting opinion was filed, though, by Chief Justice Ebenezer Lane. Lane was "not entirely certain that [his brethren] adopt [ed] the true sense of the word 'abandoned,' [as it was employed] in the special verdict." Instead, the Chief Justice was "incline[d] to think the jury meant nothing more than a want of the plaintiff's pursuing active measures to reclaim his property, and not a positive relinquishment of his right. If this be the true meaning, it would change the judgment." *Id.* at 88.

Because of the meager information supplied by the court, it is impossible to know which of Wyman's acts, or omissions, the jury relied on in finding an abandonment. Also, like Chief Justice Lane, we find it difficult to know exactly what the jury meant when it found the ship to have been "abandoned." What is clear, though, is that the Chief Justice was entirely correct when he stated that an abandonment of sunken cargo so as to lose possession must be shown not by the mere cessation of attempts to recover, but by the owner's positive relinquishment of his rights in the property. We find that this is the only principle of note to be gleaned from *Wyman.*[5]

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[5] Columbus-America also cites two other cases for the proposition that mere nonuse and lapse of time can lead to an abandonment, but neither of these cases lends any support to this argument.

In *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952), the Supreme Court of Florida wrote an extraordinary cryptic opinion from which it is difficult to ascertain any legal principle. Supposedly the plaintiff claimed an ownership interest in a derelict vessel, the schooner GENESSEE. It is not clear, through, how the vessey became derelict, where it was loaded, or under what circumstances the plaintiff obtained his supposed interest. The defendant, who had apparently salvaged the lead keel of the ship, claimed in reply that the plaintiff did not possess title, or alternatively, that the vessel had been abandoned. The Court laconically settled the issues by stating:

The testimony on the issues was voluminous, and no useful

In conclusion, when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the

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purpose would be served in here relating it. From our examination thereof, we have concluded that, regardless of the status of plaintiff's title, the evidence showed conclusively that there was an abandonment of the vessel "Genessee" and that she was a derelict at the time the defendant undertook to salvage the lead from her keel.

Id. at 1981.

If it is possible, the other case, *Steinbraker v. Crouse*, 169 Md. 453, 182 A. 448 (1936), lends even less support to Columbus-America's proposition. There, the Western Marine & Salvage Company ("Western Marine") in 1923 purchased 232 vessels which had formerly been federal government property. Western Marine stripped the vessels of all easily removable metal and then towed 169 of the hulls into Mallow's Bay, Charles County, Maryland. The hulls were then burned to the water's edge, after which they were pulled close to the shore so that metal salvaging could continue. Around March of 1931, though, Western Marine ceased its salvaging efforts and departed from the area, leaving behind only a security guard to look after its salvaging equipment on land. The next year, Western Marine sold both the land surrounding the wrecks and its equipment. After formal salvaging efforts had ceased, many local citizens began diving into Mallow's Bay to recover scrap metal from the wrecks. This continued openly for over two years, and although hundreds of tons of metal were removed and sold, Western Marine did nothing to stop the salvors nor did they demand any compensation. The price of metal began to rise, though, in 1934, and late that year Harry Steinbraker, a scrap dealer, contacted Western Marine and purchased its rights to the metal. Steinbraker then sought to enjoin the local salvors from their work, but the Maryland Supreme Court found that Western Marine had abandoned the hulls. Of course, it is foolhardy to attempt comparison between these facts and those in which a ship is involuntarily lost upon the high seas and salvage is not humanly possible for at least 125 years.

previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence.

B.

Before addressing whether the district court correctly found that the insured shipments of gold were abandoned by the underwriters, several points should be noted. First, the CENTRAL AMERICA herself was self-insured, and successors in interest to the U.S. Mail and Steamship Company have made no attempt to claim an ownership interest in the wreck. Also, there appears to have been a fairly significant amount of passenger gold aboard, but this case, almost surprisingly, has failed to see descendants of any of the passengers attempt to gain a share of the treasure. Thus, an abandonment may be found, and Columbus-America may be declared the finder and sole owner, as to any recovered parts of the ship, all passenger possessions, and any cargo besides the insured shipments.[6]

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[6] Should Columbus-America be able to prove, for example from a location on the ocean floor inconsistent with the bulk of the treasure, that certain gold was, more likely than not, passenger gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.

As for the insured gold, to *prima facially* prove their ownership interests at trial, the underwriters produced several original documents: entries from the Atlantic Mutual's Vessel Disasters Book concerning the disaster (one of which contained the scribbled notation, "e[stimated] l[oss] $150,000"); records of Board resolutions to pay claims; minutes from an underwriters' board meeting discussing the CENTRAL AMERICA; a study prepared by the New York Board of Underwriters regarding the disaster; and the salvage contract between the underwriters and Brutus de Villeroi. The insurers also produced a great many period newspaper articles. These discussed the amount of treasure on board; the insurers of this treasure and the amounts they insured; the willingness of the insurers to pay off claims; the general satisfaction the insureds received from having their claims promptly settled; and the salvage negotiations between the underwriters and the Boston Submarine Armor Company.

On appeal, Columbus-America exerts much effort in asserting that there exists insufficient evidence to prove that the underwriters who are now parties in this litigation actually insured and paid off claims upon the gold. The lower court, though, found prima *facially* that the underwriters did insure the treasure and that they received ownership interests in the gold once the claims were paid. Because of the extent of the catastrophe involved, and its feared repercussions in the American economy, newspapers around the country devoted much space and attention not only to the human aspects of the tragedy, but also the financial. Articles abounded on the quantity of gold aboard, its owners, and its insurers. Some of these articles do contradict others as to the exact amount certain underwriters insured. Still, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, paid off claims upon and became the owners of the commercial shipment of gold in 1857.

Despite finding that the underwriters owned the gold in 1857, the district court applied the law of finds and awarded Columbus-America the entire treasure. This was because at some point the insurers had abandoned their interests in the gold. On appeal, Columbus-America asserts that the lower court found an abandonment because of "20 distinct factors." It is clear, though, that the Court ruled as it did because of only two: the underwriters did nothing to recover the gold after 1858, and they supposedly destroyed all documentation they had regarding payment of claims for the gold.

During trial, the underwriters did not produce any of the original insurance contracts with the insureds, statements from shippers that goods were aboard, bills of lading, or canceled checks or receipts from paying off the claims. While such documents would have existed in 1857, none could be located in 1990. Thus, because an insurance executive testified that the usual practice *today* is for insurance companies to destroy worthless documents after five years, the district court found that the above documentation concerning the CENTRAL AMERICA must have been intentionally destroyed in the ordinary course of business. Such destruction, coupled with 130 years of nonuse, equalled, according to the Court, an abandonment. Specifically:

> The insurance carriers destroyed their records relating to the events of the Central America. Exactly when is not shown, but evidence establishes it was their custom to keep records for some five year periods, and thereafter destroy them. However, one expert in marine insurance testified that if a company intended to assert its right to subrogation, it always maintained its documents of proof of the claim and that it had paid the claim, and the fact it disposed of such documents was an indication it abandoned its claim. It is difficult to believe that a

> company claiming an asset or property worth $150,000.00 in the 1800's or even early 1900's would destroy all evidence of its claim if it had any intention to pursue it, or any hope of recovery. How could one better demonstrate their intention to abandon a claim to or interest in property than to intentionally destroy every evidence of its claim, right or title thereto. . . . They deliberately destroyed every document that would in any way show they had an interest in such a claim and had any intention to pursue it. Why? Their actions speak clearly. They had no hope or idea they could locate the Central America, and even if they could locate it, they had no hope they could recover anything from it. They destroyed the documents and intended thereby to abandon any claim they might have.
>
> . . . A clear intention of abandonment is given when all records or memorandum of the property are deliberately destroyed and no effort is made or undertaken to locate or recover the property for over a hundred years.

742 F. Supp. at 1344-45, 1348.

Contrary to the district court, we cannot find any evidence that the underwriters intentionally or deliberately destroyed any of their documents about the CENTRAL AMERICA. Instead, the only evidence we have is that after 134 years, such documents that may have once existed can no longer be located. With such a passing of time, it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed.

As has been mentioned above, a case very similar to ours is *Zych, supra.* There, in an opinion handed down after our case was decided below, the Northern District of Illinois held that the insurance company in question did not at any time

abandon its interests in the wreck of THE LADY ELGIN prior to its 1990 contract with the foundation. In that case, the only evidence presented as to the actual insurance was six letters found in one of Aetna's letter books. Interestingly, no insurance documents, bills of lading, or claims documents were entered into evidence. The Court, though, distinguished its case from ours, as ours was isolated by our lower court's opinion, by explaining: "This case, of course, differs from *Columbus-America* in that there is no affirmative act, such as the destruction of documents, which indicates an intent by Aetna to abandon the wreck." 755 F. Supp. at 216. The Court did not explain, nor did it seem perturbed by, the loss of all of Aetna's documents concerning THE LADY ELGIN other than the six letters.

It is undoubtedly true that in our case some of the insurance documents from 134 years ago are missing. Yet, the underwriters did present several other original documents from their files concerning this case, and in at least one instance all the documents in an insurer's file on the CENTRAL AMERICA were stolen by a would be salvor. Also, almost all of the evidence in the record actually seems a specific predisposition on the underwriters.

Shortly after the disaster, the underwriters negotiated with a salvage company about rescuing the gold, and the next year a salvage contract was formed between two of the insurers and Brutus de Villeroi. Nothing came of these efforts, and the issue lay dormant for 120 years. Still, it appears that the gold was not totally forgotten, for when the Atlantic Mutual Insurance Company ("Atlantic Mutual") wrote its official history in 1967, it devoted a couple of pages to the CENTRAL AMERICA tragedy and the company's salvage contract with de Villeroi.

Because of drastic advances in deep water salvage, the late

1970s witnessed a good many would-be salvors contacting various underwriters regarding the CENTRAL AMERICA. Atlantic Mutual and The Insurance Company of North America ("INA") opened their archives to these salvors, and several in turn sought to form salvage arrangements with the insurers. In particular was a Norman Scott, who, in 1978, claimed to have located the CENTRAL AMERICA. He approached Atlantic Mutual and INA in reference to forming a salvage contract, and they in turn proceeded to hire a New York law firm to locate the other underwriters and begin salvage negotiations. Scott, though, was mistaken as to his discovery, and no contract was ever formed.

Throughout the early and mid-1980s, would-be salvors continued to contact the underwriters for information on the wreck. Salvage contracts were sporadically discussed, but at no time did the insurers ever agree to abandon their ownership interests in the gold.[7] As late as 1987, INA was negotiating a salvage contract with Boston Salvage Consultants, Inc., whereby INA would receive two percent of any treasure recovered-before the parties could enter into a contract, though, the district court enjoined (through injunction box #1) these and other salvors from working in the area where it was then thought the wreck lay. In addition, not only the American insurers, but also the British, entered into various salvage negotiations, the latter through their Salvage Association.

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[7] One typical example is from 1980, when an Edwin R. Fite of Pascagoula, Mississippi, contacted the Atlantic Mutual for information on the CENTRAL AMERICA, and also inquired as to "how much it would cost to purchase the insurance claims to this wreck?" Atlantic Mutual responded by suggesting that Mr. Fite contact the law firm if had hired for such requests, and the letter also stated, "we are not interested in relinquishing any rights with respect to the cargo."

It is ironic that one of the salvors who contacted the underwriters in the 1980s was Columbus-America itself. The eventual salvor used Atlantic Mutual's extensive library for research and then, in 1987, it, through an attorney, wrote the following enigmatic letter to many of the underwriters:

> We are writing to a number of insurance companies on behalf of one of our clients. Our client is acquiring the rights to various 19th Century marine wrecks. If [your company] claims or asserts any interest in vessels or cargo which were wrecked in the Atlantic Ocean during the 19th Century and would consider conveying its claim or asserted interest, please get in touch with me.
>
> Our client would also be interested in obtaining or seeing any existing records upon which [your company] might assert a claim to any 19th Century wrecked vessel or its cargo.

Of course, none of the underwriters responded affirmatively to such a broad and mystifying request.[8]

In conclusion, when a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence. Here, we are unable to find the requisite evidence that could lead a court to conclude that the underwriters affirmatively abandoned their interest in the gold. Thus, we hold that the lower court clearly erred when it found an abandonment and applied the law of finds.

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[8] Atlantic Mutual did write back and request additional information, and when this was furnished, the insurer responded, "It is our intention to retain any rights that may be due us under general maritime law (or otherwise) and accordingly we do not wish to convey any claims or interest to your client."

Accordingly, the case is remanded to the district court for further proceedings.

C.

On remand, the district court is to apply the law of salvage, and in so doing it must determine what percentage of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America. Although this is a decision that must be left to the lower court, we are hazarding but little to say that Columbus-America should, and will, receive by far the largest share of the treasure.

In setting a salvage award, a court of admiralty becomes a court of equity. *THE BOSTON,* 3 F.Cas. 932, 937 (C.C.D.Mass.1833) (No. 1,673) (Story, J.) Such an award "is a compensation for meritorious services, [and] it may properly be increased, diminished, or wholly forfeited, according to the merit or demerit of the salvor, in his relation to the property saved." W. Marvin, *A Treatise on the Law of Wreck and Salvage* § 218, at 226 (1858). An award for salvage "generally far exceeds a mere remuneration *pro opere et labore-the* excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but, also, as an inducement to others to render like services." *Id.* § 97, at 105; *see also Mason v. THE BLAIREAU, 6* U.S. (2 Cranch) 240, 266, 2 LEd. 266 (1804).

The Supreme Court has listed six "main ingredients" admiralty courts use when fixing an award for salvage:

> (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in

> rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

THE BLACKWALL, 77 U.S. (10 Wall) 1, 13-14, 19 LEd. 870 (1869).

We thoroughly agree with all six and, in cases such as this, would add another: the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salved. In *MDM Salvage, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F. Supp. 308 (S.D.Fla.1986), the Southern District of Florida held that such a factor may be heavily considered when exclusive salvage rights are sought.[9] This same court has also stated that, "federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archeological information associated with the artifacts salved." *Cobb Coin,* 525 F. Supp. at 208. We agree, and would only add that the converse to this latter statement is also true salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded.

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[9] The court stated:

> No party in this action has engaged in independent historical research...[n]or has any party made a real effort to preserve the archaeological integrity of the purported wreck site. . . .Archaeological preservation, onsite photograph, and the marking of sites are particularly important in the instant context, as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These facts constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.

631 F.Supp. at 310.

From a distance, it appears that all seven of these considerations militate towards awarding Columbus-America a significant portion of the recovered gold. Of course, it will be up to the district court to determine if this is actually the case and what salvage award should be given.

As for the logistics in making a salvage award, we believe that in a case such as this, an award *in specie* would be proper. *See, e.g., Cobb Coin,* 525 F. Supp. at 198 (when items salvaged are "uniquely and intrinsically valuable beyond their monetary worth, an award *in specie* is more appropriate"). Also, because salvaging efforts have not been completed, the lower court might want to consider denominating the award as a percentage of the total recovery, rather than as a set monetary amount should a specific monetary award be set too high, the underwriters could end up receiving nothing, while if an award is set too low, Columbus-America would have a disincentive to completely recovering the gold.

No matter what exact award is given, though, we are confident that Columbus-America will be justly rewarded for its extensive efforts in salvaging the CENTRAL AMERICA.

III.

The final issue on appeal concerns the claims of the intervenors, Columbia, John, and Grimm. At trial, the district court held that for the intervenors to be eligible for any recovery, they had to prove that Columbus-America made use of the information provided and that such "information lead to or assisted in locating the CENTRAL AMERICA." The Court then dismissed the intervenors' claim, finding that "there [was] no credible evidence in the record to establish either of these as a fact." 742 F. Supp. at 1339-40. On appeal,

the intervenors claim that the reason such evidence was not in the record is that once intervention was allowed, the district court abused its discretion by not allowing any pretrial discovery.

The district court allowed Columbia, John, and Grimm to intervene, but only on the condition that they would begin trial the next day, thereby foregoing all pretrial discovery. Columbus-America now defends the Court's decision by stating that because the would be intervenors waited until the eve of trial to attempt intervention, the Court had it within its discretion to deny the intervention, and thus, a *fortiori,* the Court also had the discretion to limit discovery. Whether the district court could have denied the intervention motion because of timeliness is an interesting question not before us.[10] Even if the intervention could have been denied, though, it does not follow that once intervention was allowed the Court could effectively deny all discovery.

When granting an application for permissive intervention, a federal district court is able to impose almost any condition, including the limitation of discovery. *See* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1922, at 50205 (2d ed. 1986). The intervention here, though, was an

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[10] After Columbus-America reported finding the CENTRAL AMERICA in 1987, the intervenors had no reason to follow the case because the Court's first injunction box covered an area of ocean approximately thirty miles from where Dr. Ryan had surveyed. In 1989, though, Columbus-America realized it had been salvaging the wrong ship and thus went to court and received a second injunction, this one covering the area where the ship actually lay. Columbus-America published the coordinates of this new area in its Supplemental Rule C notice in the *Virginia Pilot and Ledger Star* on September 7, 1989. While such publication is to give constructive notice, the intervenors did not have actual notice until February 1990, less than two months before they filed their petitions to intervene.

intervention of right, and historically most courts and commentators have held that conditions cannot be imposed on such intervention. *Id.* § 1922, at 505. In general, intervenors of right "assume the status of full participants in a lawsuit and are normally treated as if they were original parties once intervention is granted." *District of Columbia v. Merit Systems Protection Board,* 762 F.2d 129, 132 (D.C. Cir. 1985).

The Advisory Committee Note to the 1966 amendment of Federal Rule of Civil Procedure 24 (a) states that, "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." At least one prominent commentator, though, has questioned this conclusion, noting that the Committee "cites no authority for [its] statement." 7C *Federal Practice and Procedure* § 1922, at 505-06. Still, several courts have followed the Committee's advice and imposed reasonable conditions of a housekeeping nature. *Id.* § 1922, at 506-07. Presently, we need not decide if such conditions are ever proper, for we find that the Court's denial of discovery here was clearly unreasonable.

While the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern. In *Freehill v. Lewis,* 355 F.2d 46, 48 (4th Cir.1966), we stated:

> the spirit of the rules does not require that completeness in the exposure of issues in the pretrial discovery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof.

Of course, what is ironic about our case is that an unconditional granting of intervention would not have necessarily caused any delay at all. The Court had earlier bifurcated the trial so that the first phase only concerned whether the underwriters had abandoned the gold; should no abandonment be found, a second phase, examining what the underwriters actually insured and setting the proper salvage award, would also be necessary. The intervenors asked the lower court to try their issue during the second phase of the trial, or, if a second phase were not necessary, at some later time. To us, this request appears perfectly logical: the original trial could begin and proceed as scheduled; the intervenors would have a reasonable time for discovery; and the abandonment portion of the trial would not be complicated by the addition of a totally unrelated issue. Also, considering the strong and convincing proof necessary for a finding of abandonment, the necessity of having a second phase should have appeared fairly certain to the district court. The Court, though, denied the intervenors' request and forced them to begin trial without any discovery.

"Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the *critical and decisive allegations* which go to the *core* of the parties' claim or defense and to present evidence on the contested facts." *Complaint of Bakers Trust Company,* 752 F.2d 874, 890 (3d Cir.1984) (emphasis in original). Also, we agree with Justice Black that, "No judge is granted power . . . to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case." *First National Bank v. Cities Service Co.,* 391 U.S. 253, 306, 88 S.Ct. 1575, 1601, 20 L.Ed.2d 569 (1968) (Black, J., dissenting). We thus find that the district court abused its discretion by forcing the intervenors to begin trial without an opportunity for any discovery. Accordingly, this portion of

the case is reversed and remanded for discovery and a new trial. Should it be found that Columbus-America used the intervenors' information and such use contributed to the discovery of the CENTRAL AMERICA, a salvage award could be proper.

REVERSED AND REMANDED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

Erasmus is a tough act to follow.

But even tougher is the Supreme Court of the United States.[1]

In *Bessemer City,* of course, the Court emphasized that the findings of fact of a district court, especially when the judge has heard the witnesses *ore tenus* in open court, shall not be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. In that decision, the Court reminded us of several principles that should be repeated here: "a reviewing court [must not] reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently," 470 U.S. at 573, 105 S. Ct. at 1511; "appellate courts must constantly have in mind that their function is not to decide factual issues *de novo,*" 470 U.S. at 573, 105 S. Ct. at 1511; "[w]here there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous," 470 U.S. at 574, 105 S. Ct. at 1511; and "[t]his is so even when the district court's findings do not rest

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[1] *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)

on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574, 105 S.Ct. at 1511.

In deciding this case, we must couple the deferential standard of review of factual findings set forth in *Bessemer City* with the law, unmentioned in the majority opinion, that a finding of abandonment is a factual finding subject to the clearly erroneous standard. *Nunley v. M/V DAUNTLESS COLOCOTRONIS,* 863 F.2d 1190, 1198 (5th Cir. 1989); see also *Bunge Corp. v. Agri-Trans Corp.,* 542 F. Supp. 961, 969 (N.D.Miss.1982), aff'd in part, vacated in part on other grounds, 721 F.2d 1005 (5th Cir. 1983); *Williamson v. Mennella,* 248 A.D. 911, 290 N.Y.S. 645 (1936); *The Port Hunter,* 6 F. Supp. 1009, 1011 (D. Mass. 1934); *De Bardeleben Coal Co. v. Cox,* 16 Ala.App. 172, 76 So. 409, 410 (1917), cert. denied, 200 Ala. 553, 76 So. 911 (1917); *Steinbraker v. Crouse,* 169 Md. 453, 182 A. 448 (1936); *H.B. Chermside, Jr., Annotation, Rights In and Ownership of Wrecked or Derelict Vessels and Their Contents Not Cast Upon the Shore,* 63 A.L.R.2d 1369, 1373 3[b]; 1 C.J.S. *Abandonment §* 11; *City of New London v. Pequot Point Beach Co.,* 112 Conn. 340, 152 A. 136, 138 (1930) (real property); *Bennett v. Bowers,* 238 Iowa 702, 28 N.W.2d 618, 620 (1947) (real property); *Ray Coal Mining Co. v. Ross,* 169 Iowa 210, 151 N.W. 63, 65 (1915) (lease); *Cadillac Oil & Gas Co. v. Harrison,* 196 KY. 290, 244 S.W. 669, 671 (1922) (lease); *Anson v. Tietze,* 354 Mo. 552, 190 S.W.2d 193, 196 (1945) (real property); *Newman Signs, Inc. v. Hjelle,* 317 N.W.2d 810, 817 (N.D.1982) (signs); *Llewellyn v. Philadelphia & Reading Coal & Iron Co.,* 308 Pa. 497, 162 A. 429, 430 (1932) (personal property); *McMillin v. Titus,* 222 Pa. 500, 72 A. 240, 244 (1909) (lease); *Jordan v. State,* 107 Tex. Crim. 414, 296 S.W. 585, 587 (1927) (personal property); *Garrett v. South Penn Oil Co.,* 66 W. Va. 587, 66 S.E. 741, 745 (1909) (lease). I am convinced that

the majority decision is incorrect in its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long lost wreck; in making factual findings as an appellant court; and in erroneously stating the issue to be decided by the district court on remand. In addition, I would hold that the district court did not abuse its discretion in attaching conditions to the untimely motions for intervention.

Finding of Abandonment

In my view, throughout its opinion, the majority has disregarded the rules set forth by the Supreme Court in *Bessemer City.* The majority, in contravention of the mandate that "[w] here there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous," reverses the district court's factual finding as clearly erroneous simply because, in my opinion, "it would have decided the case differently." *Bessemer City,* 470 U.S. at 573-74, 105 S.Ct. at 1511-12.

The district court found as a fact that the property taken from the CENTRAL AMERICA had been abandoned by its owners. I would hold that the district court was not clearly erroneous in making that determination. The circumstances of the insurance companies' failure to retain any indicia of ownership, such as bills of lading or commercial invoices, or to make any attempt to recover the property since 1858, coupled with the passage of more than 100 years, is ample evidence (not to mention details) to support the district court's finding that any claim the insurance companies may have had in the cargo of the CENTRAL AMERICA has been abandoned.

The majority holds that the district court committed clear error in finding abandonment because it was "unable to find

the requisite evidence that could lead a court td conclude that the underwriters affirmatively abandoned their interest in the gold, and specifically, the majority could not "find any evidence that the underwriters intentionally or deliberately destroyed any of their documents about the CENTRAL AMERICA." Majority op. at 467-468. In my opinion, both the district court's finding of abandonment and its specific finding that the underwriters intentionally destroyed the documents are amply supported by the evidence.[2] The majority's holding, by necessary implication, must be that abandonment can only be shown by an express statement by the owner indicating his intention to abandon. This holding, in my opinion, cannot be reconciled with established precedent. Abandonment may be inferred from all of the relevant facts

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[2] The majority makes much of the fact that the documents may have been lost or stolen. As I have stated, I think the evidence establishes that the most likely inference is that the documents were destroyed, in the regular course of business, as worthless. In any event, I believe resolution of the question of whether the documents were destroyed or lost is unnecessary to a finding of abandonment. The insurance companies affirmatively abandoned any property interest they had in the cargo of the CENTRAL AMERICA by not maintaining the indicia of ownership they may have had at one time pertaining to the cargo on the CENTRAL AMERICA. We cannot know, more than 100 years after the fact, why the relevant documents are no longer in the possession of the insurance companies. However, we do know that any documentation that may have existed was in the control of the insurance companies and they no longer have these documents. Had they believed that a situation would arise where they would need to prove that they had paid claims on the cargo, they certainly would have taken steps to maintain and protect the documents pertaining to the CENTRAL AMERICA. The fact that the companies do not know when the documents were last in their possession or the circumstances of their removal is sufficient evidence that they viewed the documents as worthless. The obvious inference to be drawn from the fact that the insurance companies did not maintain their documents or any record of their documents is that they had abandoned their claims to the property

and circumstances and may be deter mined [*sic*] on the basis of circumstantial evidence. See *Hatteras, Inc. v. The U.S.S. Hatteras,* 1984 A.M.C. 1094, 1097 n. 5 (S.D.Tex. 1981) ("A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property.");

City of New London v. Pequot Point Beach Co., 112 Conn. 340, 152 A. 136, 138 (1930) (real property) ("intent [to abandon] may be inferred as a fact from the surrounding circumstances"); *Llewellyn v. Philadelphia & Reading Coal & Iron Co.,* 308 Pa. 497, 162 A. 429, 430 (1932) (personal property) ("intention [to abandon] may, and indeed often must be, inferred from acts"); *Pierce V. Bemis (The Lusitania),* [1986] 1 Q.B. 384, 389 ("So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property"); 1 Am.Jur.2d *Abandoned, Lost* and *Unclaimed Property* § 40 ("it is not necessary to prove intention to abandon by express declarations or other direct evidence").

Testimony was presented, for example, that the practice of the marine insurance industry is to require that the insured present a commercial invoice and a bill of lading prior to a claim being paid, and that the practice in that industry is much the same today as it was in 1857. The insurance company then retains those documents as proof of ownership with potential salvors. None of the insurers in this action produced any invoices or bills of lading regarding shipments on the CENTRAL AMERICA. (Atlantic Mutual-J.A. 991, 999; London Assurance and the Alliance Assurance Co.-J.A. 1054, 1069; Royal Exchange Assurance J.A. 1105-1105A;

Indemnity Marine Assurance Company J.A. 1131; Salvage Association-JA. 1153; Insurance Company of America J.A. 1195). The marine insurance companies involved routinely destroyed their records on a periodic basis. However, they do not destroy documents so long as they retain an interest in the cargo of which the documents reflect ownership.[3] It is doubtlessly expensive to maintain all records which an insurance business generates, therefore the companies have made the business decision not to keep documents which are unnecessary. The obvious, most logical, and clearly permissible inference from the fact that the insurance companies did not retain any documents pertaining to the CENTRAL AMERICA is that, at some point during the past hundred and thirty odd years, the companies, giving up any expectation of ever recovering the property, destroyed their documents and, in so doing, evidence their abandonment of their claims to the CENTRAL AMERICA.[4] See *Wyman v.*

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[3] Testimony at trial concerning the companies' document retention policies was typified by an insurance company representative who was asked, "And if you thought there was any hope of recovering goods, you would not let those documents be destroyed, would you?" He replied, "No, I wouldn't."

London Assurance's representative testified that a marine insurance company would keep the documents for so long as the company retained an interest in lost cargo. Representatives for Royal Exchange Assurance and Indemnity Marine Assurance each testified that their company's policy was to retain documents for so long as it feels they are necessary and disposed of only when they serve no purpose whatsoever.

[4] The majority writes that because of the long passage of time, "it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed." Slip op. at 466. Not only is this a fact-finding by a court of appeals, opposite to the inference drawn by the district court and contrary to *Bessemer City*, the majority also puts the onus on the finders to prove that the insurance companies' destruction of documents pertaining to the CENTRAL AMERICA was deliberate. In the absence of any showing to

Hulbert, 12 Ohio 81, 87 (1843) (vessel is abandoned when "all hope, expectation) and intention to recover the property were utterly and entirely relinquished" by the owner) ; *U.S. v. Smiley,* 27 F.Cas. 1132, 1134 (Cir.Ct.N.D.Cal. 1864) (Justice Field) (cargo from shipwreck was abandoned when "all efforts to recover the property had been given up" by the owners.)

Indeed, I further submit that the specific finding that the insurance companies destroyed their documents is amply supported in the record by both direct and circumstantial evidence. The following testimony of one Richard Smith, Atlantic Mutual's representative at trial, is suffi cient, in and of itself, to support the district court's find ing:

> Mr. Davey (Attorney for Columbus-America): You don't have any of the policies today that may have covered goods on board the CENTRAL AMERICA, do you?
>
> Mr. Smith: At present, we do not.
>
> Mr. Davey: To the best of your knowledge, they have all been routinely destroyed along with the other business records of the company?
>
> Mr. Smith: That's correct.
>
> * * * *
>
> Mr. Davey: So that the bills of lading which would have

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the contrary, I would place the burden on those who last had possession of the documents to establish that they were "lost or unintentionally destroyed." Indeed, standard learning is that the failure of a party who possesses a document to produce it permits an inference that its tenor is unfavorable to the party's cause. See *Missouri, K. & T. Ry. Co. v. Elliott,* 102 F. 96, 101, 103 (8th Cir. 1900); *Wigmore* on *Evidence, Chadbourn* (1979) 285, 291

been taken up as part of the proof of loss have been destroyed as a matter of course?

Mr. Smith: If they had been taken up, they probably would have been destroyed in that and/or we moved several times. They could have been missing in that. Probably in the destruction when we destroyed the claim files if they existed. They would have been destroyed.

* * * *

Mr. Davey: But any record of sale would have been destroyed in the ordinary course of your business just like the insurance policies, the bills of lading and commercial invoices and everything else?

Mr. Smith: Yes, sir, if one existed.

Evidently, the majority did not consider this testimony, as it states that the district court held that the documents were intentionally destroyed "because an insurance executive testified that the usual practice *today* is for insurance companies to destroy worthless documents after five years. . ." Majority op. at 466 (emphasis supplied by the majority). Even that contention of the majority is also incorrect, I submit, because testimony was presented, not just as to the current practice, but as to the document destruction policies of the companies for more than 40 years. The insurance companies' representatives testified that, for as long as they had worked for the companies (which in some cases was over 40 years), the companies had document destruction policies in place.[5]

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[5]Alan John Birch, who appeared as a representative of claimants London Assurance and the Alliance Assurance Company, began in the marine claims business 43 years ago for London Assurance. He testified that the longest period of document retention that he was aware of at the company was 10 years, and that so long as the company retained an

The majority's holding that "it seems as, if not more, likely that the documents were lost or unintentionally destroyed, rather than being intentionally destroyed," illustrates the majority's misconception of our role on appeal. It is not our role to decide a case on appeal based on which factual inference we would draw from the evidence. See *Bessemer City*, 470 U.S. at 573-74, 105 S.Ct. at 1511-12. Rather we should only determine if the factual inferences drawn by the district court are supported by the evidence. In addition to the clear testimony of Atlantic Mutual's representative that the policies covering goods on the CENTRAL AMERICA were destroyed and that the bills of lading were probably destroyed, the evidence showed that not one of the numerous insurance companies involved in this litigation was able to produce any of the documents that would have to be produced prior to a claim being paid, and that the companies destroy documents on a routine basis. In my opinion, these facts fully support the inference drawn by the district court, but rejected by the majority, that the documents were intentionally destroyed.

In addition, the passage of over 130 years since the cargo was lost is strong circumstantial evidence of abandonment.[6]

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interest in lost cargo, it would not destroy the documents with respect to the loss.

Richard Smith, Atlantic Mutual's representative, has worked for the company for 30 years. He testified that during his entire tenure at Atlantic Mutual, the company has had a document destruction policy, under which it destroys claim files and other documents after from five to 10 years.

[6] I would hold that long-lost wrecks such as the one in question here are presumptively abandoned. See *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987) (law of finds applies when "articles have been presumptively abandoned, *i.e.*, either affirmatively

And, as the First Circuit has stated in *Martha's Vineyard,* 833 F.2d at 1065, when "articles have been so long lost that time can be presumed to have eroded any realistic claim of original title, and . . those articles are now in hand, having been actually recovered, the better-reasoned authorities agree that the law of finds may appropriately be utilized." See *Chance v. Certain Artifacts Found and Salvaged,* 606 F. Supp. 801, 804 (S.D.Ga. 1984), aff'd without opinion, 775 F.2d 302 (11th Cir. 1985) ("Under the law of finds, the inference of abandonment may arise from lapse of time and nonuse of the property ... since THE NASHVILLE has rested at the bottom of the Ogeechee, unclaimed by its owner since 1863, this court concludes that the law of finds applies.") As the

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renounced, or *so long lost that time can be presumed to have eroded any realistic claim of original title. . .")* (emphasis added). "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 337 (5th Cir.1978). In *Treasure Salvors,* the Fifth Circuit held that disposition of the treasure retrieved from a Spanish galleon, the NUESTRA SENORA DE ATOCHA, sunk in 1622 and found near the Marquesas Keys in the Gulf of Mexico, should be governed by the law of finds rather than salvage law.

Under the law of finds, title is vested in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." 569 F.2d at 337, quoting *Ricard* v. *Pringle,* 293 F. Supp. 981, 984 (E.D.N.Y.1968). Salvage law provides that the original owner maintains ownership and the recoverer only receives a salvage award.

The majority attempts to distinguish *Treasure Salvors* from the instant case on the fact that the parties in Treasure Salvors had stipulated that the ATTACH had been abandoned by its original owner, the Spanish government. Nothing in the court's opinion indicates that the decision would have been any different had the Spanish government appeared in court to assert a claim. The parties merely stipulated to an obvious fact, that the long lost ship was abandoned.

amount of time since the loss of the ship increases, the strength of the presumption that the property has been abandoned, stated above, increases, I suggest. In this case, more than 130 years is sufficient to establish a very strong presumption that the property has been abandoned.[7]

At the risk or [*sic*] repetition, I again state that I think the majority's out-of-hand dismissal as clearly erroneous the district court's finding of abandonment is quite contrary to law, for the inferences and factual conclusions made by the district court are supported by the evidence. Indeed, even as to lack of weight, the weakness of the evidence relied upon by the majority is exposed by only casual analysis. The majority writes that "almost all of the evidence in the record actually seems to indicate a specific predisposition on the underwriters' part not to abandon the treasure." Majority op. at 467. However, all the majority points to in support of this proposition is evidence of salvage negotiations in the 1860's involving two of the insurers, the fact that Atlantic Mutual, in its official history, written in 1967, devoted a couple of pages to the tragedy, and the insurers' actions from the late 1970's to the present upon being contacted by potential salvors

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[7] The difficulty in adjudicating rights concerning cargo on a ship lost for 135 years is underscored by the Herculean task facing the district court on remand. Contrary to the majority's assertion that "[w]ithout doubt, most, if not all, of the claims were promptly paid off by the underwriters," at 456-57, there is doubt as to how much of the cargo was actually insured and, just as importantly, which insurance claims were actually paid. The only evidence available are speculative newspaper accounts from the 1850's. On remand, the district court will be faced with the difficult, if not impossible, task of determining which claims were paid by the insurance companies and in what amounts. This problem is caused by the insurance companies' failure to maintain the records necessary to establish their claims. Had the insurance companies not abandoned their claims they surely would have maintained the records necessary to establish their amount.

concerning their potential claims. Majority op. at 467-468.

Evidence of salvage negotiations from the 1860's is, of course, of little consequence in determining if the insurers abandoned their claims subsequent to the 1860's. And the very fact that the 1860's efforts at salvage were either abandoned or not undertaken is, indeed, evidence of abandonment. In fact, it is highly likely that at the time the insurers explored the 1860's salvage options, they possessed all the documentation concerning their claims. They knew those documents would be necessary to establish the amounts of their claims. It was probably not until after the salvage operations proved unsuccessful that the insurers abandoned their claims. They destroyed the only documentation that would be necessary to prove the amounts of their claims when, at a later time, they lost all hope of recovering the property. In so doing, the district court held there was evidence of abandonment, and I agree.

The fact that Atlantic Mutual mentioned the CENTRAL AMERICA tragedy in its official history is, in my view, no evidence of a "specific predisposition" not to abandon the property. It indicates no more for Atlantic Mutual than that Atlantic Mutual, which believed it was an insurer of some of the cargo, found the sinking of the CENTRAL AMERICA to have been an interesting historical matter in the company's history. Indeed, the fact that that history shows that Atlantic Mutual has *even now* retained some papers referring to the CENTRAL AMERICA, but not the papers necessary to prove a claim or even the amount of the loss, is evidence that the matter was later abandoned.

Finally, evidence of the insurers' actions concerning their potential claims from the 1970's to the present is of little consequence in determining whether the insurers abandoned their claims prior to the 1970's. Property, once abandoned,

cannot be reclaimed absent possession. See 1 C.J.S. *Abandonment* § 12. It is apparent that the insurers abandoned the property because at the time they did so, they had no hope of ever recovering it. Clearly, once the technology became available following World War II to make recovery a possibility, the insurers would not agree that they had abandoned any claim. This explains their activity in the recent past and their establishment of files. However, since property, once abandoned, cannot be reclaimed absent possession, in my view their 1970's and subsequent activity is of little consequence in determining whether they abandoned their claims at some point during the previous 120 years. A property interest abandoned as valueless cannot be revived simply because new technology, some 120 years later, has made the abandonment seem to have been error. In fact, an equally or more valid inference than the one drawn by the majority is that the insurance companies creation of files in the 1970's and '80's, pertaining to the CENTRAL AMERICA, supports the conclusion that they had abandoned their claims. [8] These files were created when potential salvors contacted the insurance companies in the 1970's and '80's.[9] Had each insurer not abandoned its claim earlier, there would have been no need to create a file because one would have existed since 1857. By reasonable inference, each insurer believed the cargo it insured on the CENTRAL AMERICA was irretrievably lost and any property interest it had in the cargo was worthless. As a consequence, each insurer abandoned what to them was a worthless interest in the cargo.

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[8] For the most part, these files contained nothing more than newspaper clippings and letters from potential salvors.

[9] The fact that would-be salvors contacted some of the insurance companies is, of course, of no consequence in determining whether the property was abandoned. A reasonable person might seek to avoid litigation with potential claimants by obtaining assignments of any possible claims they may have.

Also, it is interesting that, even after the technology for recovering the CENTRAL AMERICA became available, the insurers did not enter into any salvage contracts concerning its recovery. They did nothing to recover the property, just as they had done for the past 130-plus years.

As I have shown, the evidence offered by the majority provides little support for its argument that the insurers did not abandon their claims. In my opinion, the majority's substitution of its judgment as to the facts is even more improper when, as here, there is ample support in the record for the district court's factual finding of abandonment.

Finds v. Salvage

I disagree with the majority's decision to apply the law of salvage to the facts of this case. It appears to base its decision on the erroneous belief that courts favor applying salvage law rather than the law of finds. Majority op. at 460. In fact, in the context of long lost wrecks, such as the instant case, courts, almost without exception, apply the law of finds. *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked* and *Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987) (ocean liner sunk in1909); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir.1985) (English ship sunk in eighteenth century); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir.1978) (Spanish galleon sunk in 1622); *Sub-Sal, Inc. v. The DeBraak*, No. 84-296, 1992 WL 39050, at * 1-2, 1992 U.S. Dist. LEXIS 2461, at * 6-7 (D.Del.1992) (British ship sunk in 1798); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 746 F.Supp. 1334, 1343-44 n. 12 (N.D.Ill.1990), vacated, 941 F.2d 525 (1991) (steamer sunk in 1860); *Jupiter Wreck, Inc. v. Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1385

(S.D.Fla.1988) (Spanish galleon sunk in seventeenth century); *Indian River Recovery Co. v. The China,* 645 F.Supp. 141, 144 (D.Del.1986) (ship sunk in nineteenth century); *Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE,* 606 F.Supp. 801, 804 (S.D. Ga.1984) (Confederate raider sunk in 1863); *Wiggins v. 1100 Tons, More or Less, of Italian Marble,* 186 F.Supp. 452, 456 (E.D.Va.1960) (Norwegian ship sunk in 1894); *Commonwealth v. Maritime Underwater Surveys, Inc.,* 403 Mass. 501, 531 N.E.2d 549, 552 (1988) (pirate ship sunk in 1717); see also Schoenbaum, *Admiralty and Maritime Law* § 15-7, p. 514 (1987) ("In virtually all of the treasure salvage cases involving wrecks of great antiquity, the law of finds, not salvage, is appropriate . ..") Even *Benedict on Admiralty,* from which much of the majority's opinion appears to have been derived, would apply finds law to "long lost wrecks." See 3A Norris, *Benedict on Admiralty,* § 158, p.11-17 (1992).

Modern courts have rejected application of the law of salvage in the context of long lost wrecks because, under the law of salvage, even an abandonment does not divest the owner of title. See 3A Norris, *Benedict on Admiralty,* § 150, p. 11-1 (1992) ("Should a vessel be abandoned without hope of recovery or return, the right of property still remains in her owner.") ; *Sub-Sal, Inc. v. The DeBraak,* No.84-296, 1992 WL 39050, at * 1-2, 1992 U.S. Dist. LEXIS 2461, at * 6-7 (D.Del.1992) ("Cognizant that the application of salvage law involves a presumption that the owner often abandoned vessel has not been divested of title, this Court rejects the salvage law theory."). The major premise of salvage law, that the property to be salved is owned by persons other than the salvor, is inapplicable in the case of long lost wrecks. See Schoenbaum, *Admiralty and Maritime Law,* § 15-7, p. 512 (1987).

The majority opinion breaks with the law of every other circuit that has decided the question and holds salvage law to be applicable to long lost wrecks. See *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1065 (1st Cir.1987) (ocean liner sunk in 1909); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel,* 758 F.2d 1511, 1514 (11th Cir. 1985) (English ship sunk in eighteenth century); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330, 337 (5th Cir.1978) (Spanish galleon sunk in 1622). I agree with our sister circuits that "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Treasure Salvors, Inc.,* 569 F.2d at 337.

Impermissible Factfinding

Also, the majority has disregarded well-established law that appellate courts should not engage in factfinding. The majority has decided, on appeal, that the insured shipment was worth $1,219,189 (1857 valuation) when the amount of the insured shipment was not an issue before the district court. Majority op. at 465 n. 6.

The trial before the district court was to be bifurcated. The first portion was to decide if the insurers or anyone else could establish a claim to portions of the cargo. The second part of the trial was to involve a determination of the amount to be awarded to any claimants who established they had a valid claim. However, the second part of the trial was never held since the district court determined that no one other than Columbus-America had established a right to any of the cargo. Therefore, the question of how much of the shipment was insured was not before the district court and should not

be decided in the first instance by this court.

In addition, the majority finds as a fact that the insurers had established an ownership interest in the cargo. Majority op. at 465-466. The majority attempts to disguise its factfinding by attributing a holding to the district court that was, in fact, never made by it. The majority writes that "the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, paid off claims upon and became the owners of the commercial shipment of gold in 1857." Majority op. at 465. The district court did not hold that the underwriters had paid claims and become owners of the commercial shipment. The district court did not decide the factual issue of whether the insurers had proven that they had an ownership interest in the cargo because the district court clearly was satisfied, as am I, that in any event the cargo had been abandoned.[10] Since the district court did not decide the

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[10] As evidenced by the following passage in the district court's opinion, the court clearly was unimpressed with the evidence presented by the insurance companies as to ownership:

> Insurance Companies rely solely upon the newspaper accounts for evidence that they were insurers, the name of the insured, the amount of the insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. Without the newspaper accounts, the evidence is totally insufficient to establish any claim of the insurance companies.

Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 742 F. Supp. 1327, 1341 (E.D.Va. 1990).

The majority appears to have concluded that since the district court stated that the evidence was "totally insufficient" without the newspaper accounts, the court was implicitly stating that the evidence was sufficient with those accounts. I do not agree with this conclusion. I believe the

factual question of whether the insurers had established that the claims were ever paid, it is en tirely improper for this court to make that factual ruling at this juncture. On remand, the district court should be given an opportunity to fully address the issue of whether the insurers met their burden of proof in establishing an ownership interest in the cargo and, in its proper role as a finder of fact, to decide that issue in the first instance.

Issue on Remand

In my view, the majority has incorrectly stated the issue to be determined on remand. It writes that the district court "must determine what percentage of the gold each underwriter insured." Majority op. at 468. This ignores the fact that the insurers only became owners of cargo to the extent of their payment of claims. The amount they insured is irrelevant. The crucial fact is how much cargo they actually paid claims on. The burden is on the insurance companies to establish the amount of claims that they actually paid.

Intervention Motion

I also disagree with the majority's holding that the district court abused its discretion by allowing Columbia University, Harry John, and Jack Grimm to intervene on the eve of trial only on the condition that the trial go ahead as scheduled. The trial was set for April 3, 1990. On March 29, 1990, John and

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district court was merely stating that without the newspaper accounts there was no evidence to support the insurance companies' claims and with the accounts there was some evidence. The court did not find that the insurance companies had met their burden of proof in establishing that they had paid claims and therefore had acquired an ownership interest in the cargo.

Grimm filed their motion to intervene. Columbia filed its motion on April 2, 1990. It would have been well within the district court's discretion to deny the motions to intervene as untimely. See *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir.1989), cert. denied, 493 U.S. 1058, 110 S.Ct. 870, 107 L.Ed.2d 953 (1990) ("This Circuit has stressed the importance of timeliness and the wide discretion afforded the district courts."); *NAACP v. New* York, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648 (1973) (district court's ruling on timeliness will not be disturbed on appeal unless the court abused its discretion). In determining whether a motion to intervene is timely, courts look at how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene. *Gould*, 883 F.2d at 286. In this case, the motions for intervention were filed on the eve of trial after all pre-trial discovery had been performed by the parties then in the suit. Any delay in the commencement of the trial would have prejudiced Columbus-America as its ability to attract funding was directly impacted by resolution of the issues concerning ownership of the cargo, and key members of the recovery team were required at trial and a delay in the trial would have interfered with Columbus-America 5 recovery efforts. Finally, there was no excuse for the intervenors' tardiness in moving to intervene. They were put on constructive notice, at the latest, on September 7, 1989, when Columbus-America published its Rule C notice in the *Virginia-Pilot and Ledger Star* stating the coordinates of the area where the CENTRAL AMERICA was found. Moreover, the record reveals that Columbia has been aware of, and indeed a part of, this litigation almost from the first moment that Columbus-American first set foot in court. Less than two months after filing its original in rem complaint on July 17, 1987, Columbus-America sought and obtained a preliminary injunction forbidding other would-be recoverers of the treasure from an area then thought to contain the wreck of the

CENTRAL AMERICA. See *Columbus-America Deep Search, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,* Civil No. 87-363N (E.D. Va. July 17, 1987); App. 53. Not only was Columbia a party in that proceeding and specifically addressed in the district court's order, it appealed and unsuccessfully sought a stay of the injunction in this court. See order of August 3, 1987 entered in our case no.873606, which appeal was later dismissed by stipulation on December 18, 1987. The fact that the CENTRAL AMERICA later was found within the area established by the injunction of August 1989, see Civil No. 87363N (E.D.Va. Aug. 18, 1989), does not later the inescapable fact that, at the latest in July of 1987, Columbia had actual knowledge of Columbus-America's assertion of rights over the very wreck that was the subject of Dr. Ryan's work and of the very lawsuit in which Columbia later sought to intervene on the eve of trial. See 742 F.Supp. 1327, 1334 (E.D.Va. 1990); App. 438. Given these facts, it would not have been an abuse of discretion for the district court to have denied the motions for intervention as untimely.

However, rather than deny the motions, as it could have done, the district court conditionally permitted the intervention on the intervenors' willingness to go forward with the trial at its previously scheduled time. Conditions can be imposed on an intervenor even when he intervenes as a matter of right under Rule 24(a). See *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 383, 107 S.Ct. 1177, 1185, 94 L.Ed.2d 389 (1987) (Brennan, J., concurring) ("restrictions on participation may also be placed on an intervenor of right") ; *United States v. South Florida Water Management Dist.,* 922 F.2d 704, 710 & n. 9 (11th Cir.), cert. denied sub nom. *Western Palm Beach County Farm Bureau, Inc. V. United States,*—U.S.—, 112 S.Ct. 407, 116 L.Ed.2d 356 (1991); *Harris V. Perusley,* 820 F.2d 592, 599 n. 11 (3d Cir.1987), cert. denied sub nom. *Castille v. Harris,*

484 U.S. 947, 108 S.Ct. 336, 98 L.Ed.2d 363 (1987); *United States v. Hooker Chemicals & Plastic,* 749 F.2d 968, 99293 n. 22 (2d Cir. 1984); *Morgan v. McDonough,* 726 F.2d 11, 14 (1st Cir. 1984). The conditions imposed by the district court were not onerous considering the untimeliness of the motions for intervention. In fact, the court even allowed the intervenors to perform limited discovery during trial.

If the intervenors were unhappy with the conditions imposed, they had the option of declining the court's offer. Had they done so, their motion to intervene would have been denied and that denial could have been appealed to this court. The majority's holding thus allows the intervenors two days in court instead of the time honored one. Because they accepted the court's conditions, they were able to participate in the trial. At trial, they lost. Now the majority's holding will allow them to try their case a second time. I would hold that the district court did not err in conditioning John, Grimm, and Columbia's untimely intervention on their willingness to participate in the trial at its previously scheduled date. The district court, by being overly accommodating to the intervenors, and not requiring them to take the case as they found it, if intervention was granted, as it had every right to do, is now wrongfully found guilty of error, I submit, for its perfectly proper rulings.

The effect of the majority's decision is to allow a prospective intervenor to delay a motion to intervene until the eve of a trial it has known about for months, and then force either a delay in the trial or error. I submit that Rule 24 (a) properly admits of no such result.

Conclusion

In sum, I would affirm the district court's judgment. I would hold that the district court was not clearly erroneous in

finding that the insurance companies had abandoned all claims they may have had to the cargo in the CENTRAL AMERICA and that the district court did not abuse its discretion in placing conditions on granting of the untimely motions to *intervene.*

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
NORFOLK DIVISION

Civ. A. No. 87-363-N

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Plaintiff,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern boundary—31° 37' North latitude; Southern boundary—31° 33' North latitude; Western boundary—77° 2' West longitude; Eastern boundary—76° 57' West longitude (believed to be the S.S. CENTRAL AMERICA), *in rem,*

Defendant.

Aug. 14, 1990

Richard T. Robol, Philip N. Davey, Robert M. Tata, Hunton &

Williams, Norfolk, Va., William J. Kelley, Jr., Curtis A. Loveland, Robert W. Trafford, Porter, Wright, Morris & Arthur, Columbus, Ohio, for plaintiff.

Guilford D. Ware, Crenshaw, Ware & Martin, Norfolk, Va., Douglas A. Jacobsen, Bigham, Englar, Jones & Houston, New York City, for claimants Atlantic Mut., et al.

William W. Nexsen, Stackhouse, Rowe & Smith, Norfolk, Va., John H. Reilly, Jr., Dickerson & Reilly, New York City, for Harry G. John and Jack F. Grimm.

Daniel R. Warman, John Y. Richardson, Jr., Williams,Worrell, Kelly, Greer & Frank, Norfolk, Va., for the Trustees of Columbia University in the City of New York.

OPINION AND ORDER

KELLAM, Senior District Judge.

This admiralty action filed in this Court on May 27, 1987, is an outgrowth of the tragedy of the sea which occurred September 12, 1857, when the Central America sank in the Atlantic Ocean some 160 miles due East of Charleston, South Carolina, where the Gulf Stream meets the Sargasso Sea. She was said to be one of two luxury passenger ships making a run from Aspenwall, Panama, to New York. She was a wooden-hulled, side-wheel steamship built in 1852. During the period prior to completion of the railroad from the East to the West Coast in 1869, travel from San Francisco to New York was principally by steamer to Panama, by train across

the Isthmus of Panama to the port of Aspenwall, and then on to New York by steamer. Much of the gold mined in California following the gold rush of 1849 shipped or carried by passengers to the East was by the above route. The subject of this action involves gold shipped and carried by passengers over the above route.

I.

On August 20, 1857, the Pacific Mail Steamship "Sonora" left San Francisco for Panama with a number of passengers and quantities of gold aboard. It docked at Panama on September 3rd. The passengers and gold were put upon the Panama Railroad for the three hours journey to Aspenwall. The passengers with the gold which they were carrying and the shipped gold were placed upon the side wheeler Central America. The Central America sailed at 4:00 p.m. on September 3rd for Havana. It docked at Havana on September 7th in the evening. After transfer of some passengers and cargo, it sailed on September 8th at 9:30 a.m. for New York. On the evening of the 9th, it encountered the fringe of a hurricane and sailed on into its fury. As a result of the forces of the hurricane, a leak in the ship developed on the morning of the 11th and by 2:00 p.m. of that day, the fire in the boilers was extinguished by the influx of water from the leak. With the continuation of the storm, efforts of the crew and passengers in bailing the ship failed to keep her afloat. Many passengers were transferred by the life boats to two passing steamers, and some others were hauled from the water hours after the Central America sank.

News of the tragedy was collected from survivors. Newspapers over several areas of the world collected and published stories of the sinking. Frank Leslie's Illustrated Newspaper published in New York for October 3rd, 1857, reported that when the Central America left Havana for New

York, it carried 492 passengers exclusive of the crew. Of that number, 166 were rescued and 336 lost their lives. Many of the passengers were gold miners returning to the East to invest their findings, and others to collect their families and return to California. He further recorded that the Central America was the richest ship, passengers and cargo considered, that was ever engulfed in the waves of the sea, when her rich freight of gold was lost.

The Chicago Tribune, in an article of September 23, 1857, reported that many of the surviving passengers of the Central America stated there was seldom so large an amount of money owned by passengers as those aboard the Central America, numbers of whom reckoned their gold by thousands. The New York Journal of Commerce, in an article of September 23, 1857, said that the exact number of saved and lost would probably never be known, but that it was generally agreed that when she left Havana, she had on board nearly 600 and that the number saved varied between 166 and 187.

Passenger Jane Badger, who was one of the rescued, said her husband was carrying $17,500.00 with him in gold coins in a carpet bag until just before the ship sank. Passenger Caidwell saved 20 pounds of gold dust carried in a belt around his waist. One passenger reported he had $2,000.00 in gold in a belt. There were other accounts of passengers who had been carrying gold with them aboard the Central America.

In a report to the Secretary of the Navy, Lt. Matthew Fontaine Maury, USN, under date of October 19, 1857, said that there was on board 575 persons and about two million in gold. He further reported that the information concerning the sinking had been compiled from newspaper reporters who had obtained much information from the survivors.

A.

During the last decade, substantial efforts were made to locate the wreck of the Central America. Such efforts were expensive and time consuming. Scientific and historical research required many hours. Plaintiff in this case, as well as the insurance claimants, located numerous newspaper articles published concerning the sinking of the Central America and the loss of life.

The services of experts in many fields have been enlisted. Special equipment was and is required for any such type of undertaking. Patience, skill, long hours of hard work, and some degree of luck, a willingness to risk and a deep pocket are and were necessary for such an undertaking. Plaintiff has expended in excess of ten million dollars in the project. While plaintiff is positive it has located the Central America, it is still engaged in its efforts to bring to the surface the artifacts and portions of the cargo.

One will well understand that only portions of the cargo will be found.

II.

Utilizing numerous written accounts, oceanographic, meteorological and other data, modern search theory mathematics, advanced technology and equipment, along with the services of numerous experts, the Columbus-America Discovery Group undertook the search for the wrecked Central America. A specially equipped ship was obtained for the undertaking. Among the equipment was a sidescan sonar, satellite navigation, tele-operated deep-sea equipment (submersible with stereo camera and robotic arms) and computer modeling software, all of which helped to make the discovery possible.

The Central America is said to have settled upright. Since 1857, the Central America has been attacked by the forces of the deep sea. The iron works of her two coal-fired engines, boilers and other fixtures have partially disintegrated under the corrosive action of the salt water and her wooden hull has collapsed.

Thomas G. Thompson, a research scientist in the area of ocean science, headed the undertaking. He pointed out that in preparation for the undertaking, examination was made of hundreds of newspaper articles, statements by numbers of the some 160 survivors, and other information. Thompson said he spent some 13 years researching the historical and technical aspects of the shipwreck of the Central America. Correlation of the data of the survivors—eye witnesses—dealing with conflicts in the accounts and separating the facts from speculation was exceedingly difficult and time consuming. Commencing the search necessitated the development of probability search maps. This required a determination of the probable location of the sinking. Consideration had to be given to the accuracy of the navigational information available as to the probable location of the ship at the time of its sinking, to the quality of the information furnished, to the normal prevailing currents, to what a hurricane does to the normal currents, to the movement of the ship as it begins to fill with water, to how the ship acts as it sinks, to the manner in which it sinks, and to how the information of action of the weather of that day fit into the advanced knowledge and skills of today. Models were created to try to determine drifting patterns and windblown currents and to try to determine how fast and how far a ship would drift under such conditions. Experts making use of these types of information prepared a probability map of where to search for the wrecked vessel. Too, study had to be made of what might be revealed by the sonar. Very little work like this had been done before. In the

search, plaintiff found hundreds of what the experts called anomalies on the sea floor which had to be interpreted. They developed a computer process to assist them in undertaking the analysis of these anomalies. Upon analyses, a determination was then made of the most likely targets for the Central America. Many things affected what type of object appeared on the sonar. The sonar ability was much ahead of the interpretative skills. After one develops his or her best guess as to which image is the target he is looking for, it is then necessary to make a number of passes over the object, use video cameras, and to study the image and data in order to undertake to reach a better understanding. There is no set pattern to follow. One must determine what would be expected to remain of a ship which had been in that depth of water some 132 years. It is a new field in science. No one before has seen a ship that has been in that depth of water for that long a period of time.

It was after many hours and days of tedious research and study that plaintiff could determine the most likely targets. The first target thought to have been the Central America was not in fact it. It so happened that one of the earlier targets turned out to be the Central America. Only after re-examining the images in great detail, and location of the ship's bell, was plaintiff fully convinced it had located the famous wreck.

III.

HISTORY OF LITIGATION

As shown above, this admiralty action was commenced by complaint filed May 27, 1987. Plaintiff asserted this Court had *in rem* jurisdiction over the portion of the wreck found and brought within the jurisdiction of this Court and *in personam* jurisdiction over any potential claimants who made contacts with this forum; that the said wreck was wholly derelict and

had been abandoned by the owners; that plaintiff is the owner of said wreck and has taken the necessary action to exercise complete and absolute dominion and control over it and is entitled to the exclusive possession of it, and to the protection of this Court; that in any event, it is entitled to a liberal salvage award; that plaintiff is entitled to an injunction enjoining others from interfering with its recovery efforts; and it prays that a warrant of arrest issue, and the Marshal take into custody the artifacts, articles and such portions of the defendant wreck, cargo and artifacts as may be presented. In due time, a motion for a substitute custodian was filed.

On July 7, 1987, an amended complaint was filed enlarging the radius of the search area, an order for arrest was entered and directed to be executed, and a substitute custodian named. By that order, plaintiff was directed to, within 10 days after execution of the process, to cause public notice of the action and arrest to be given for not less than 5 consecutive days in the Virginian-Pilot, a daily newspaper published in Norfolk, Virginia, setting forth the docket number of the action, a general description of its nature, the fact of arrest, and requiring any person claiming any interest to file their claims and answers within 45 days. The warrant of arrest was issued and executed July 7, 1987, following which the properties were turned over to the substitute custodian. Pursuant to motion, on July 9th, a temporary restraining order was issued restraining the R/V Liberty Star (Star), her master, officers, crew and all persons aboard, the Board of Trustees of Columbia University, Lamont-Doherty Geological Institute (Trustees), S.S. George Law Partnership (Law) and Boston Salvage Consultants, Inc. (Boston), from conducting salvage operations, photographing, entering or causing to enter on or above the surface within the designated boundaries as defined in the order. A cash bond of $100,000.00 was required and posted and a copy of the TRO duly served. A hearing was scheduled for July 16, 1987. On July 10th, a motion, with an

incorporated supporting brief, was filed by Law, Trustees and Boston who appeared specially and moved to dismiss the TRO issued on July 9th for lack of jurisdiction, and to contest the award of exclusive salvage rights of plaintiff. The motion set forth that movants were involved in a deep water survey, search, identification and salvage operation in a section of the Atlantic Ocean approximately 160 nautical miles off the coast of Georgia believed to be the area in which a passenger vessel traveling from Havana to New York, known as the Central America, sank during a hurricane on September 12, 1857; that from historical information and newspaper accounts, movants believe the vessel may have contained gold in significant quanties; that if they can locate and identify the vessel, they intend to salvage it for profit; that they have conducted the search operation by using a side scan sonar and a deep water tow fish with depressors capable of providing rapid and reliable information about the sea floor and features; that possible targets revealed by the sonar are investigated further by the use of underwater camera equipment, including real time video, still frame and ocean data censors; and that salvage operations will ultimately be effected by the use of a remotely operated vehicle capable of handling the remains of a vessel and retrieving its contents. The motion continued by asserting "activities of George Law are being conducted in association with Columbia University . . . ." (p. 3 of Motion and Brief) that considerable funds have been expended and it is entitled to continue until it or a competing interest actually locates and salvages the vessel.

Following the hearing on July 16, 1987, the Court, by order filed July 17th, enlarged the TRO into a preliminary injunction. Notice of appeal was filed and a motion presented to one of the judges of the Forth [*sic*] Circuit Court of Appeals for a stay of the enforcement of the injunction. By opinion of that judge filed August 10th, the stay was denied. By motion of August 13th, 1987, the appellants moved to

dismiss the appeal.

On August 20, 1987, S.S. George Law Limited Partnership and Boston Salvage Consultants, Inc. filed their answer herein denying the allegations of the amended complaint, and counterclaim. In their counterclaim, they asserted they were organized for the purpose of locating the wreck of the Central America and salvaging it, and that upon information and belief the plaintiff had abandoned their undertaking. Plaintiff responded and denied the allegations of the counterclaim. Subsequently, on December 18, 1987, upon joint motions of the parties, the answer and counterclaim of S.S. George Law and Boston Salvage were dismissed with prejudice.

On September 8, 1987, plaintiff moved the Court to hold Dana Leonard, Master of the M/L Cameron Seahorse, Steadfast Oceaneering, Inc., Zapata Gulf Marine Corp., South Carolina Marine Archeological Trust and Walter Kreisle in contempt of court for violation of the injunction order of July 17, 1987, and for entering or attempting to enter the restricted area. An order to show cause was issued. Following a hearing, the Court found the parties guilty of civil contempt, and ordered them not to release any information discovered in connection with the violation of the injunction. Plaintiff thereafter sought to recover damages, costs and attorney's fees incurred as a result of said parties violating the injunction. By opinion of January 25, 1988, the Court, having found all of said parties in contempt, postponed the assessment of damages, costs and attorney's fees to give them an opportunity to purge themselves by no further violations of the injunction.

On March 23, 1989, a second amended complaint was duly filed, expanding the area to a radius of 50 miles, ordering arrest or seizure of artifacts, and appointing substitute custodian. Publication of notice of arrest was ordered for five

consecutive days in the Virginian-Pilot, requiring claimant to file their claim within 10 days after process was executed and their answers within 20 days. The notice was duly published. On June 15, 1989, plaintiff filed a motion for award of title to all properties recovered. By order of August 18, 1989, adopting the findings of fact and conclusions of law filed June 30, 1989, the Court enlarged the preliminary injunction into a permanent injunction and ordered the release of the cash bond to plaintiff.

On August 30, 1989, plaintiff filed a third amended complaint setting out enlarged boundaries. The Court ordered arrest, and publishing of notice as in the previous order. By order of September 29, 1989, the answers of Atlantic Mutual Insurance Company and some 38 other companies were filed, asserting that by reason of payments made for losses, they were subrogated to the rights of the owners in the cargo of gold; that they were making claims on behalf of themselves and the account of the owners; and that they are the owners of said properties and entitled to possession thereof. On the same day, they filed an answer denying each of the allegations made by plaintiff in each count of their complaint.

On October 13, 1989, Dennis Standefer filed a claim asserting that pursuant to a contract with Thomas G. Thompson, he was entitled to a share of any recovery made by Thompson from the Central America. On October 19, he filed an answer denying plaintiff was entitled to the full recovery and that he was entitled to a share of any recovery. Standefer also instituted a separate suit against Thompson, asserting he is entitled to recover a portion of any sum received by Thompson in this action. That action was thereafter merged with this suit. Because that claim was for alleged breach of contract and against Thompson, who is not a party to this suit, upon motion the Court dismissed the claim filed in this suit by Standefer, with right to file an amended

claim within 10 days against plaintiff in this suit. By way of information, a motion of Thompson for summary judgment in C/A 89-753 has been granted and that suit dismissed.

A final pretrial order was entered in this action March 16, 1990. Among other things, it was stipulated:

(A) Plaintiff has been engaged in search and recovery of defendant wrecked and abandoned sailing vessel within the coordinates—(those of the 3rd amended complaint).

(B) The wreck is the remains of the S.S. Central America which sank September 12, 1857.

(C) Central America had not been successfully salvaged before commencement by plaintiff.

(D), (E) & (F) Plaintiff is an Ohio corporation which conducts deep ocean discovery and salvage, and has located and recovered items from the Central America shipwreck.

(G) The general location of the wreck is approximately 160 miles off the East Coast of United States in the Atlantic Ocean, about 1 1/2 miles below the surface.

(H) & (I) Claimants were not the owners of the cargo prior to its sinking and have never marked the wreck or any of the cargo of the Central America.

(J) through (Q) London Assurance Association was established by Royal Charter in 1720; Alliance Assurance Company, Limited was established 1824; Atlantic Mutual Insurance Company was incorporated April 11, 1842 by the laws of New York, Royal Exchange Assurance by Royal Charter in England, The Indemnity Marine Assurance Company, Limited, July 4, 1824 in England, Marine Insurance

Company Limited in England in 1836, and The Salvage Associates established in England in 1856 and incorporated by Royal Charter in 1867.

By order of March 29th, the Court dismissed some 21 of the named insurance company claimants with prejudice. Though agreeing to the dismissal, defendants desired dismissal without prejudice. The list of dismissals is shown in Appendix "A" hereto attached. By that same order, the Court directed claimants to file on the morning of trial a statement of their claims setting forth the name of the claimant, the name of the shipper, the insured, identification of the specific property shipped, the value of each shipment and the name and similar information as to each coinsurer as it relates to the cargo.

On March 29, and April 2, 1990, respectively, Harry G. John and Jack F. Grimm and the Trustees of Columbia University (Trustees) moved to intervene to assert a claim to any interest in any find or salvage, asserting they had furnished information to the plaintiff or that plaintiff had used information belonging to them. On their representation that they were ready to proceed with trial on April 3rd and to prove their claim, they were on April 3rd, 1990, over objection of plaintiff, permitted to intervene and their respective claims were ordered filed. They were further granted permission to add to the final pretrial order the names of witnesses and to list exhibits deemed necessary to prove their claims. Plaintiff was granted right to add lists of exhibits and names of witnesses in rebuttal of their claims. By order of April 3rd, 1990, the Court foreclosed the filing of any further claims in this action. Trial commenced and the presentation of evidence was concluded on April 12th. Counsel requested and were granted the right to file briefs and argue the case orally on July 11th, 1990. A transcript of the argument and additional briefs were filed the end of July and the case

submitted for decision.

By agreement with the parties, the Court was to determine (1) whether the artifacts and items recovered from the Central America were a find or whether the operation was a salvage, and (2) whether any party other than plaintiff established any right, title or interest in the items. If the Court determined the operation was not a find, then the Court would hold further hearings to determine and deal with the rights of the insurance companies.

IV.

Jurisdiction of the Court is not now an issue. A claim to title of lost property by occupancy "may be asserted in an *in rem* proceeding instituted once the goods have been recovered and brought to shore within the jurisdiction of the court." *Treasure Salvors, Inc. v. The Unidentified Wrecked* and *Abandoned Sailing Vessel,* 640 F.2d 560, 567 (5th Cir.1981) (Salvors III). The law of maritime salvage and finds protects the rights of one who undertakes such a recovery project to carry it to completion without interference from others who seek to share in the enterprise and reward. *Id. See also Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Vessel,* 1989 A.M.C. 1955 (E.D. Va. 1989). The *res—or* at least the greater portion of it is within the jurisdiction of this Court. The Court has previously determined it had jurisdiction of the res and the subject matter of this suit. Those who sought to question it withdrew their appeal and dismissed their cause of action.[1] Such determination has therefore become the law of the case. No one since that time has sought to raise the issue. The present claimants have submitted to the *in personam* jurisdiction of the Court.

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[1] Trustees were parties to the original action, but not to the appeal.

Section 1333 of Title 28 U.S.C. grants federal courts jurisdiction of all cases involving admiralty or maritime claims. "The subject matter jurisdiction granted by this statute is not limited to causes of action arising from events or occurrences on the territorial waters of the United States." *Salvors III,* 640 F.2d at 566. "Claims arising out of . . . effort to recover ships disabled or abandoned at sea to retrieve their cargo . . . are unquestionably within the admiralty jurisdiction of the federal courts." *Id.* Hence, courts of the United States take jurisdiction "of suits on maritime claims arising out of transactions and occurrences anywhere in the world." Ch. 1, §§ 1-19, page 51, *The Law of Admiralty,* 2nd Ed.1925, Gilmore & Black. The above language was quoted with approval in *Salvors III,* 640 F.2d at 566-67.

A.

The law of admiralty is clear that a salvor has a valuable interest in his salvage, and "in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period . . . the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy in one who discovers such abandoned property and reduces it to possession." *Salvors III,* 640 F.2d 567. *See also Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, etc.,* 569 F.2d 330, 336 (5th Cir.1978) *(Salvors I).* The law "acts to afford protection to persons who actually endeavor to return lost or abandoned goods to society as an incentive to undertake such expensive and risky ventures . . . ." *Salvors III,* 640 F.2d 573.

A real issue here is whether salvage law or the adjunct law of finds should be applied. The insurance companies contend the law of salvage should be applied here, while plaintiff contends the law of finds is the applicable law. The insurance

companies rely upon the authority of M. Norris, *The Law of Salvage*, § 150 (1958), and cases following his theory. That theory is referred to in *Salvors I*. The opinion there makes it clear that courts "have rejected the theory that title to such property can never be lost and have applied the law of finds. *Wiggins v. 1100 Tons, More or Less of Italian Marble*, 186 F. Supp. 452, 456-57 (E.D.Va.1960). *See Nippon Shosen Kaisha, K.K. v. United States*, 238 F. Supp. 55, 59 (N.D. Cal.1964); *Rickard v. Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y.1968)". *Salvors 1*, 569 F.2d at 336-37. "Under this theory, title to abandoned property vests in the person who reduces the property to his or her possession. *Id.*

Norris, in his treatment on salvage, as do insurance companies here, suggests difficulties may be brought about by applying the law of finds rather than that of salvage. The Court in *Salvors I* dealt with this question and said it failed to see how the law of salvage would provide a more effective deterrent to a clash, as under find or salvage, an award goes to the one who is able to seize possession.

There are two considerations in determining whether property has been *lost* or *abandoned*. First, whether the location of the property is known, and second, even if its location was known, whether it has been abandoned.

"Lost" means not able to find, its whereabouts unknown, unable to locate, no longer possessed, removed from reach or attainment.

"Abandonment" means a yielding to natural impulses, to withdraw protection, support or claim; to desert; to cease intending or attempting to perform; to terminate possession or protection. "Abandonment includes both the intention and the external act by which the intention is carried into effect; intention may and indeed often must be inferred from acts." *In*

re G.M.P. Land Co., 33 B.R. 729, 731 (1983); *Llewellyn v. Philadelphia and Reading C. and I. Co.*, 308 Pa. 497, 502, 162 A. 429 (1932). Whether there is abandonment is to be determined from "a consideration of the nature of the property and the conduct of the parties [plaintiff] in relation to it. *Russell v. Stratton*, 201 Pa. 277, 278, 50 A. 975 (1902)" *Id.* "Whether a sunken wreck has been abandoned is a question of fact." *Bunge Corporation v. AgriTrans Corporation*, 542 F. Supp. 961, 969 (N.D.Miss. 1982), *aff'd* in part, vacated in part on other grounds, 721 F.2d 1005 (5th Cir.1983). Abandonment "may be accomplished by either an express or implied act of leaving or deserting the property without hope of recovering it and without the intention of returning to it." *Id. See also Chicago and North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 313, 101 S.Ct. 1124, 1128, n. 2, 67 L.Ed.2d 258; *Ellis v. Brown*, 177 F.2d 677 (6th Cir.1949).

"Whether property has been abandoned is a question of intent, which may be inferred from all of the relevant facts and circumstances. *United States v. Manning*, 440 F.2d 1105 (5th Cir.), *cert. denied*, 404 U.S. 837, 92 S.Ct. 125, 30 L.Ed.2d 69 (1971)". *United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir.1988). Valid abandonment occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." 3A *Benedict on Admiralty* § 134 (7th Ed.1980); *Bunge, supra*, 542 F. Supp. at 969.

The difference between lost and abandoned property is that in the first instance it often is involuntary while in the second instance it is by intent and design. Abandonment is the voluntary relinquishment of a right. Clearly, personal property of all kinds may be abandoned by an owner with the view of divesting himself of title and ownership. In determining the question of whether property has been abandoned,

consideration must be given to the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery and all other facts and circumstances.

Plaintiff asserts that it is vested with absolute title to the properties in question under the law of finds. "Under this theory, title to abandoned property vests in the person who reduces that property to his or her possession. *Salvors I*, 569 F.2d at 337. There, in holding that the trial court had correctly applied the law of finds, the Court pointed out that "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Id.*

The law of salvage for a number of years governed the location of recovery of ships and their cargo lost at sea. "Modern courts, however, have rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of *animus revertendi* (the owner has no intention of returning)" (citations omitted). *Chance v. Certain Artifacts Found and Salvaged from the Nashville A/K/A The Rattlesnake, Her Engines, etc.*, 606 F. Supp. 801, 804 (S.D.Ga.1984), *aff'd* 775 F.2d 302 (11th Cir.1985). Thus, "in a first finder situation, the law of finds and salvage merge to give the first finder/salvor the sole possession of the property." *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.*, 631 F. Supp. 308, 311 (S.D.Fla.1986). The common law of finds, and not maritime salvage law, was applied to determine ownership of a shipwreck even though within the confines of a national park and the territorial sea of the United States. *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) In *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 518 F. Supp. 816 (W.D.Tex.1981), the Court, in

dealing with an issue of whether the State had title to a found shipwreck said "if the State insists that it has title to the res, the Court could find that the State had abandoned the res (by never executing any contract or otherwise indicating possession of the res) and the finder of the abandoned property gets to keep the find. The Court in *Indian River Recovery Co. v. The China,* 645 F. Supp. 141 (D.Del.1986) applied the law of finds and pointed out that demonstration of possession and control of abandoned property is the prerequisite to an award of title under the law of finds. *See also Hener v. United States,* 525 F. Supp. 350, 356 (S.D.N.Y.1981).

In *Rickard,* cited above, the Court held that title to a propeller recovered from a vessel abandoned on the ocean floor for sixty years vested in the first finder lawfully and fairly appropriating it and reducing it to possession with the intention to become its owner.

In order to determine the ownership of a shipwreck on the outer continental shelf-outside the territorial waters of the United States—the Fifth and Eleventh Circuits relied on the law of finds instead of the maritime salvage law. The Court reasoned that because application of maritime salvage law was predicated on the fiction that the owner of the wrecked vessel was still in existence, it would be absurd to apply maritime salvage law to a vessel whose very location had been lost for centuries. Instead, "the Court held that title to abandoned property vests in the person who reduces that property to his or her possession, (citations omitted), [and] [T]he common law of finds is the appropriate law to examine to determine the ownership of the shipwreck." *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel,* 758 F.2d 1511, 1514 (11th Cir.1985). "The common law of finds generally assigns ownership of the abandoned property without regard to where the property is found." *Id.* There are

two exceptions, neither of which is applicable here, In *Wiggins, supra,* the court sitting in admiralty held that the party who first finds and recovers derelict property at sea is entitled to full title. There, the ship had been sunk some 66 years. The Court held that even though lapse of time and non-use are not sufficient, in and of themselves, to constitute abandonment, under certain circumstances, they may give rise to an implication of intention to abandon. *See also* the following cases: *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1065 (1st Cir.1987); *Commonwealth of Massachusetts v. Maritime Underwater Surveys, Inc.,* 1987 A.M.C. 2590, 2606 (Mass.1987), *aff'd* 1989 A.M.C. 425, 403 Mass. 501, 531 N.E.2d 549 (1988); *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.,* 549 F. Supp. 540 (S.D. Fla.1982) *Eads v. Brazelton,* 22 Ark. 499, 79 Am. Dec.88 (1861); *Deklyn v. Davis,* 1 Hopk. Ch. 135 (N.Y.1824); *Creevy v. Breedlove,* 12 La.Ann. 745 (1857); *State by Ervin v. Massachusetts Co.,* 95 So.2d 902 (Fla.1956), *cert. den.,* 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112 (1956); *Steinbraker v. Crouse,* 169 Md. 453, 182 A. 448 (1936); *Howard v. Sharlin,* 61 So.2d 181 (Fla.1952); *United States v. Smiley,* 6 Sawy. 640, F.Cas. No. 16317 (C.C. Cal. 1864); *Thompson v. United States,* 62 Ct. Cl. 516 (1926); *Wyman v. Hulburt,* 12 Ohio 81, 40 Am. Dec. 461 (Ohio 1843).

CLAIMS OF COLUMBIA UNIVERSITY AND JOHN AND GRIMM

On April 2nd, 1990, Columbia (Trustees) submitted a motion to intervene in this action. Trial had long before been scheduled to commence on April 3rd. Upon their agreement, they were ready to proceed without change of date for trial. They were permitted to intervene. In their claim filed on April 3rd, they set forth that since 1980, they had sought to locate

and recover the wreck of the Central America; that in February 1984, Santa Fe Communications, Inc. (Santa Fe)[2] contracted with Trustees to map a twenty nautical square mile area of the Continental Margin of the Eastern United States encompassing the coordinates of 31 degrees 30 minutes North latitude, and 77 degrees West longitude in an effort to find the Central America; that such a search was made and the survey imaged several acoustic targets of man-made artifacts, only one of which was large enough or reflective enough to be echoes of the size of the Central America[3] that Thomas G. Thompson, the lead man of plaintiff's search in 1986 requested of Trustees information of the survey; and that Trustees furnished portions of the information from the survey to Thompson. Trustees contend that the information furnished lead [*sic*] plaintiff to the location of the Central America. Trustees further assert that they were among those enjoined by the Court by the injunction order of July 17, 1987, from searching in the area where plaintiff was searching, and that two weeks previous to filing their claim, they learned that plaintiff had expanded the area of its search. Trustees assert that by reason of their survey of 1984, they have an ownership interest in the wreck or claim to any recovery, and they are entitled to a liberal award for their services.

Harry G. John and Jack F. Grimm, like Trustees, on April 3rd, 1990, the day the trial of this suit commenced, sought to and were permitted to intervene. They assert that John is the successor in interest to Santa Fe; that since 1984 they have sought to locate and recover the Central America; and that

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[2] The claim of John and Grimm, as does Trustees, grows out of the activitv conducted by Trustees for Santa Fe from whom John and Grimm obtained an assignment.

[3] Bishop's investigation, hereafter dealt with, disagrees with this contention, as do plaintiff and others.

John, as President of Santa Fe, contracted with Trustees in 1984 to have Trustees map the area described above in Trustees' claim. The remainder of the allegations of their claim are about the same as those of Trustees.

In December 1984, Santa Fe assigned all of its right, title and interest in its properties, information or claims relative to or arising out of any attempted salvage of the Central America to the Province of St. Joseph of the Capuchin Order—St. Benedict Friary of Milwaukee, Wisconsin (St. Joseph). Sometime in early 1990, John obtained an assignment back from St. Joseph. Grimm is a party because of some arrangement he had with Santa Fe to share equally with Santa Fe in any recovery from the Central America. Since the filing of the claim by John and Grimm, St. Joseph has obtained an agreement between John and Grimm to pay over to it a portion of any sums they may recover.

While there is much evidence concerning the dealings between John, Santa Fe and St. Joseph, most of it has little or nothing to do with the issues before the Court of whether Santa Fe or John Grimm have any right to share in any recovery by plaintiff.

A.

In the early 1980's Thomas Thompson was doing research on information relative to a possible salvage of the Central America and putting together a group to finance such an undertaking. John was a person interested in such an undertaking and had discussions with Thompson. John requested Thompson to obtain information for him. In the negotiations, Thompson made suggestions of what services might be obtained for such an undertaking. On December 12, 1983, Thompson wrote John enclosing a prospectus from a charter company to provide a "Sea Marc Deepsea Survey

System," [Plaintiff's exhibit 439], as prepared by Williamson & Associates, a firm headed by M.E. Williamson. The prospectus gave information about personnel available and their qualifications. It also gave a brief description of the capabilities of the Sea Marc I and II and made reference to the equipment of Lamonte-Dougherty Geological Observatory, a unit of Columbia University (Trustees). It pointed out that it was the policy of Trustees to make public the data obtained by work done by them. However, Thompson was not employed for the survey. Exhibit 432 is a proposal submitted to John on behalf of Santa Fe by Trustees, dated February 14, 1984, for a Sea Beam Mapping of Continental Margin in Vicinity of 30 degrees 30 minutes North and 77 degrees West. Among other provisions, the agreement between Santa Fe and Trustees provided (1) Trustees would be free to publish the results of the research, without restrictions, one year after termination of the contract, and (2) Santa Fe could send personnel to examine the progress of the work, and from time to time, require a more detailed search of a particular area. Santa Fe in fact did have aboard the survey ship some three persons to observe the work. The contract was to terminate September 30th, 1984. The contract was reviewed for Santa Fe by its counsel who reported on the terms and made certain recommendations. Among other things, counsel pointed out that Trustees reserved the right to publish any information obtained, and in Exhibit 440, on page 2 of the attachment, "suggested the possibility that even likely locations would be made known to the world . . . [and because] John . . . has no control over dissemination, someone else might . . . be able to put together a project using this information before Mr. John can do so himself." Later in the letter it suggested there should be provisions for immediate reporting to Santa Fe of any likely or suggested target, so that it might at that moment be further pursued. Again on the third page, it called attention to the danger of permitting publication. A change was made

in the contract to restrict publication for one year from completion of the contract. Upon completion of the survey, Trustees made a report to Santa Fe, Exhibit 445 is a memo from Captain O'Connell to John dated April 25, 1984, relative to the Central America for an operation in July, on certain targets, some or all of which were apparently those reported in the Trustees' survey. O'Connell said that 8 of the 11 targets were good possibilities. However, John did not undertake this operation, and nothing came of this contact.

Sometime in early 1986, Thompson contacted Dr. Ryan at Columbia relative to the survey it had made for Santa Fe and asked to be furnished certain information from it. He wrote Dr. Ryan on February 12, 1986 saying that pursuant to his telephone conversation of that day, he would like to have copies of the some 20 8 x 10 negatives of the sonar record done by Sea Marc in the February 1984 survey; that he was submitting the order primarily out of personal interest, and he had a personal source of funds available for such collection and correlation; that Ryan should bill him personally for up to $250.00 for the material; and to send them to his (Thompson's) home address which he set out in the letter. (Trustees' Exhibit 2)

By letter of March 19, 1986, (Trustees' Exhibit 3) the Division Administrator of Trustees reported to Thompson that pursuant to request to Dr. Ryan, they were preparing to make contact prints of the contour map. The letter pointed out that since the data was not in the public domain and Trustees would not release the right to publication until students who were working on the data compiled and published their dissertations, "we would require your agreement that any photo-copied records or computer tapes you receive would be for your sole use and would not be reproduced for others." Thompson agreed. The parties agreed that the photos sent to Thompson were merely an index to the

tapes of the survey. On April 1, 1986, Dr. Ryan wrote Thompson that the photos had been sent that he could provide the tapes at a cost of $1,732.00. In that letter, Dr. Ryan set out the exact language as that set out in the above letter from the Division Administrator of March 19, 1986, prohibiting reproduction. Thompson paid the $250.00 and declined to obtain the tapes.

Trustees now contend that plaintiff used the information in the photos which they furnished Thompson in his efforts to locate the Central America and therefore they are entitled to share in any recovery plaintiff may make. Trustees agree that if plaintiff did not use the information which Dr. Ryan sent to Thompson, then they have no claim and are not entitled to any portion of a recovery by plaintiff. The claim of John and Grimm is grounded in the same contention that plaintiff made use of information from the Santa Fe survey which Ryan sent to him.

Plaintiff asserts that Trustees and John and Grimm have no claim, and are not entitled to any portion of any recovery made by it.

First, as to Trustees, plaintiff says the photos sent by Dr. Ryan to Thompson were of no value to Thompson or plaintiff, and were not used by Thompson or plaintiff in the search for and location of the Central America. Further, plaintiff says that Trustees had no saleable or otherwise valuable property interest in the information from the survey and that their only interest was the right to publish it after one year from the date of the contract. Plaintiff asserts that Trustees contracted to make the survey for Santa Fe and furnish Santa Fe a report and that they were paid in full the market price for the work and the survey was the property of Santa Fe. Further, plaintiff asserts that Thompson paid the requested fee for the photographs, and that they were

furnished with no restriction except that they would not be "reproduced for others."

It is asking too much to believe that if Thompson had a likely target of the Central America and he could obtain the details of the location for $1,750.00, that he would not pay that sum rather than be confronted with searching in the dark for it at a cost of $20,000.00 per day, the daily cost to operate the search vessel.

As to the claim of John and Grimm, their claim will also fail unless it is shown plaintiff used the information from the survey. Too, since Trustees reserved the right to publish this information after one year from the date of the termination of the contract, i.e., one year from September 20, 1984, and the information was not furnished until March 1986, plaintiff says John and Grimm's claim must fail. Neither John nor Grimm assert they had any contact with plaintiff or Thompson relative to the survey or a request for information, nor do they or Trustees contend there was any contractual arrangements with Thompson or plaintiff other than the restriction in the letter for reproducing the photos.

Trustees make much of the contention that they thought they were furnishing the information to Battelle Laboratories, where Thompson worked; that it was the custom for laboratories to share data; and he (Ryan) thought he was furnishing the information to the Battelle Laboratory for its study and use. In fact, Dr. Ryan stated under oath that on or about April 1986, Columbia sent copies of the sonar imagery including the imagery of the Central America wreck site to "Battelle Columbus Laboratory upon Thompson's representation that said material was for its sole use and would not be produced for others." (Tr., p. 1458) He admitted on the witness stand that the information-photos-were not sent to Battelle Laboratories, but were sent to

Thompson personally at Thompson's home for his sole personal use and that they were paid for by Thompson personally and he was in error when he made the statement under oath as set out above. Not only did he admit it, but the exhibits fully show this to be a fact.

Trustees now make the contention that the survey of 1984 showed a target of the Central America, and that it was of great value to plaintiff, for which they are entitled to share in any recovery made by plaintiff. However, in Trustees' report to Santa Fe at the conclusion of the 1984 survey, reference was made to one object which the report said was a good candidate as a target for the Central America.

First, Trustees, and John and Grimm, must show that plaintiff made use of the information. They admit that if plaintiff did not use it, they have no claim. Even if they prove plaintiff did use the information, they must show that the target was the Central America or that the information lead to or assisted in locating the Central America. They have not proved either of these contentions, nor offered any credible evidence to establish such facts, and unless the Court is to indulge in speculation, conjecture, supposition or guess, there is no credible evidence in the record to establish either of these as a fact. Thompson stated clearly and without reservation that no use was made of the information furnished and there is no credible evidence in the record to suggest otherwise. The Court accepts the testimony of Thompson as an established fact. A consideration of all of the evidence supports this finding. The uncontradicted testimony establishes that commencing in 1986, and through 1987, plaintiff located several targets which might be the Central America. One in particular was an excellent candidate. A second target was located which was a splendid candidate. In 1987, they were of the opinion the second target was a prime candidate. An injunction was obtained. Upon return to sea in

1988, after further review of the sonar targets, plaintiff decided the "excellent candidate" was the target to pursue. Plaintiff decided to return to the target located in 1986 and do further investigation. They discovered side wheels, and then located the bell, which convinced plaintiff it had located the Central America. After recovery of other items, it applied to the Court for an enlargement of the injunction box.

Plaintiff argues that neither Santa Fe nor Trustees had any faith in the fact any target it located was likely the Central America. Neither Santa Fe nor Trustees sought to pursue their targets further. Santa Fe had three representatives aboard the ship during the survey. They had authority to require the ship to make a more thorough investigation of any target. It is difficult to believe that if the target set off such a "hissing" sound, as Dr. Ryan says it did, that a more thorough investigation was not then immediately done. The cost of the survey was some $300,000.00. To assemble another survey to check out the target would have been expensive. While John may have thereafter contemplated further surveys and investigation, neither John nor Trustees went back to that target or, if they did, they have failed to say so.

It seems even more unusual that in 1987, when the Court enjoined Boston Salvage, Law, Trustees and Liberty Star from attempting to interfere with plaintiff's exploration within the area defined in the injunction order, Trustees made no contention it had furnished the information of a likely target to Thompson. Moreover, even though Trustees and the others were enjoined from searching in the area of the injunction box, they were not enjoined from searching elsewhere, and inasmuch as they were not enjoined from searching elsewhere, and even though they contend the target shown in the Santa Fe survey was the Central America, and it was not within the injunction box of the 1987 Order, they at that time did not further investigate the Santa Fe survey

target.

It is not expected that a lay person could have examined the information furnished by Trustees to Thompson and been able to make heads or tails out of it. Nor should or could it be expected that a person with expertise could have examined the photographs furnished, without more, and have been able to go to the location of the object. Thompson testified that some of the arrows which were supposed to identify objects appeared to be only dust spots, and other little blimps were difficult to characterize; that they did not have dimensions on them and there was not enough information to affect his interest one way or another; that when he saw the information, he decided it was of no value and getting the digital data would be of no assistance or value.

The testimony of expert Bishop—one extremely qualified in dealing with sonar and sonar maps—reviewed the charts from the 1984 Santa Fe survey. He did so for Captain Searle who was trying to set up an expedition with John relative to a search for the Central America. He was of the opinion target 4 (the one Dr. Ryan says fit the description of the Central America) was not even a likely target. He picked out target number 3 as a possible candidate. Captain Searle is a retired Navy Captain, an ocean explorer and had served most of his 28 years in salvage, five years of which he served as Navy's Chief Salvage Officer. He was employed by Santa Fe to evaluate the Santa Fe survey of 1984. He visited Dr. Ryan in February 1986, and wrote a memo of his conversation with Dr. Ryan, from which he testified. On the visit, Dr. Ryan showed him the data package of the 1984 survey and what had been found. He said Dr. Ryan indicated there hadn't been any contacts found as a consequence of the survey, and that he specifically asked him "if they found anything worthy of going back and going over it again or taking photographs, and he said, no, they hadn't and he specifically said they had

photographic equipment on board and they hadn't gotten it wet." (Searle Dep. p.11) His opinion confirms Thompson's decision that the information furnished by Trustees was of no use or value. In fact, as Dr. Ryan said, the photos were only an index, but even assuming one could locate objects shown, it would make no difference here, for Thompson said that when he looked at the materials furnished, he determined they were of no value, and he made no use of the information.

Trustees, and John and Grimm, have failed to establish their claim or any right to share in any recovery by plaintiff or of Thompson. First, they have failed to establish (1) that they furnished information that assisted or could have assisted in the location of the Central America; (2) that plaintiff and/or Thompson used any information furnished; (3) even if the information was of value and was used, that any such use would entitle them to share in any recovery. Their claims are therefore DISMISSED.

V.

This action has been pending since May of 1987. Plaintiff has, by action in this Court, enjoined and fought off two separate groups who sought to interfere with their efforts to recover and reduce to its possession the remains of the Central America and its cargo. By direction of Order of this Court of July 7, 1987, notice was timely given in this action to anyone claiming any interest or right to appear and assert such right or claim. By findings of fact filed June 30, 1989, the Court found that when the Central America was located by the plaintiff, it was in international waters, and in an abandoned and derelict condition; that plaintiff had exercised dominion and control over the wreck and reduced it to its possession; that it was in the process of recovering the artifacts and things of value; and that it was entitled to possession and full and exclusive ownership thereof.

On September 29, 1989, the Atlantic Mutual Insurance Company and some 37 other insurance companies appeared and, by leave of Court, filed their claims to all items of gold recovered from the Central America. They asserted that they had insured the commercial shipments of gold carried aboard the Central America, had paid the shippers for their loss, and were subrogated to the rights of the shippers. The insurance companies assert that it was common knowledge that regular shipments of gold were made from California to New York by way of Panama; that such shipments were insured; that some of the shippers advertised that their shipments were insured; and that there is ample evidence in the record to establish that commercial shipments were often, if not generally, covered by insurance. Reports of the sinking of the Central America from numerous newspaper accounts set forth that some shipments of gold aboard the Central America were insured and that some insurance companies paid certain of the losses. Insurance Companies rely solely upon the newspaper accounts for evidence that they were insurers, the name of the Insured, the amount of insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. Without the newspaper accounts, the evidence is totally insufficient to establish any claim of the insurance companies.

Plaintiff asserts that newspaper accounts and other evidence shows that only a portion of the commercial gold aboard the Central America was insured; that considerable amounts of gold were carried by passengers, some of which was deposited with the Purser and some kept on their person or with their baggage and personal effects; and that the record of deposits with the Purser went down with the ship.

Insurers contend that they insured and paid for loss of $1,219,189.00, and that of this sum the London insurance companies paid $766,666.00 and the American companies paid $452,523.00. They further assert that according to the New York Times of Monday, October 5, 1857, the "Sonora" (a passenger ship operating on the West Coast) carried passengers and shipments of gold from San Francisco to Panama of $1,595,497.13, and that $271,000.00 of this amount was shipped by West India mail steamer from Aspenwald [*sic*] direct to England, "leaving a balance of $1,324,497.13 in treasure probably lost on board the Central America." (Ap. III Claimants' Post Argument Memorandum) However, plaintiff points out that other articles of the newspapers reported that a shipment of some $400,000.00 was off-loaded at Havana, and numerous of the reports stated the gold aboard the Central America exceeded $2,000,000.00. To say that there are numerous conflicts in the newspaper accounts and reports is conservative.

A.

First, the Court must consider whether the newspaper accounts are subject to the hearsay objection raised at trial.

Rule 802 of the Federal Rules of Evidence provides:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress.

Rule 803 of said rules provides:

That the following are not excluded by the hearsay rule

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity

of which is established.

In a discussion of the admissibility of hearsay, we begin with the established principle that cross-examination is of vital importance in establishing the value and trustworthiness of such evidence. The requirement the witness be sworn, testify in the presence and hearing of the trier and be subject to cross examination is lost in most instances of hearsay. The restriction in the admissibility of ancient documents is "the authenticity of which is established." The purpose of the admission and exactly what is sought to be established by the item will often determine its admissibility. For instance, in *Dallas County v. Commercial Union Assurance Co.,* 286 F.2d 388 (5th Cir. 1961), a 58 year old newspaper story was admitted to prove the occurrence of a fire in a public building. However, the same Court in *Poretto v. United States,* 196 F.2d 392, 395 (5th Cir.1952) ruled that newspaper articles are not admissible to prove facts stated therein. In *Montana Power Co. v. Federal Power Commission,* 185 F.2d 491 (D.C.Cir.1950), *cert. denied,* 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683, old newspaper accounts on the question of navigability of the Mississippi River during the 19th century were admitted to prove navigability at that earlier date. The question often arises as to whether assertive statements in the article are admissible. In *Wathen v. United States,* 527 F.2d 1191, 1199 (Ct.Cl.1975), the Court in considering a newspaper account of a shooting, held it hearsay, but said "that insofar as they reported the fact of the shooting, resulting in death observed by witnesses, they provided reliable and substantial evidence."

In 55 ALR3d 663, a number of cases are collected dealing with the admissibility of newspaper articles in evidence. From a consideration of the cases there cited, and the case law generally as they apply the rule, the consensus of opinion seems to be that the articles are admissible for specific

purposes, such as to prove the time, place and happening of the event and general information of it. There are some restrictions on the admissibility of such articles to prove the truth of certain statements or the truth of their content. Matters of public interest, where the facts are generally known throughout the community or nation, reported in numerous newspapers and rereported over a period of time may be a much better account of the truth than what an eyewitness may remember years after the event.

Even if there be restrictions on the use of newspaper articles that are admitted in evidence, where they deal with such an event as the sinking of the Central America, they are admissible as an ancient document. The weight to be given the articles is to be determined from all of the facts and circumstances in the case, giving consideration to what is sought to be proven by the articles. That is, where the articles meet the ancient document rule, they are generally admissible and any further question usually goes to the weight of the evidence. *United States v. Koziy,* 728 F.2d 1314 (11th Cir.1984), *cert. denied,* 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). *See also Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir.1984).

B.

Before dealing with some of the issues raised by each of the parties, the Court should deal with the issue of whether the location of the Central America and the items removed from it are a find or whether the result of the labors of the plaintiff are salvage. The parties agree that as between plaintiff and the insurance company the issue is whether under the facts of this case the ship and its cargo were abandoned. If it had been abandoned, then insurance claimants have no right to any part of any recovery.

There can be no doubt of the fact that the Central America was lost and its location not known.[5] Until located by plaintiff, no one claimed to have seen anything to resemble it after September 1857, the time of its sinking. Nor has anyone (other than plaintiff) come forward with information or a map of its location. For a number of years before it was located by plaintiff, many had done studies, research and attempted to locate it with the idea and purpose of reaping the reward of such a recovery.

There were many newspaper articles written about the sinking back in 1857. Beyond these, information was scarce. To assemble the necessary information and equipment to attempt a search for the Central America required the expenditure of many hours of research and study. It was not a job or undertaking for a person of only ordinary skill. It required expertise in many fields and the assembling of numerous types of experts. Mr. Thompson said he did research on the Central America for some thirteen years.

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[5] Claimants cannot suggest the vessel was not lost, for they have sought throughout this proceeding to compel the plaintiff to reveal the exact location of the wreck and how they located it.

Research for this, and other sunken vessels, had previously been undertaken and proven costly and without success. Unusual knowledge of the Atlantic Ocean and of such an undertaking was a requirement. Any degree of success hinged on many contingencies such as equipment, personnel, weather, timing, condition and depth of the water, financing, ability of equipment to perform, and so on. Attempting recovery from water of such depth was new. So far as shown by the evidence, no one had ever before sought to search for and recover a wooden ship in such depth of water. Nor did anyone have much knowledge or information of what effect the water, tides, currents and other things would have done to a wooden vessel sunk some 182 years before. What would one really expect to see and find in such a search?

As shown above, "abandonment" includes both the in tention and the external act by which the intention is carried into effect. Intention often may and must be inferred from acts or failure to act. "Whether a sunken wreck has been abandoned is a question of fact." *Bunge, supra.* What one says or does, or fails to say or do, often establishes intention. Clearly, it can and most often must, be proved by circumstantial evidence.

Some 39 insurance companies attempt to assert the rights of ownership to the cargo of gold aboard the Central America. That number was later reduced to some eleven and the Salvage Association which attempt to assert the claim of two companies that no longer exist. The same is true of the Superintendent of Insurance for the State of New York who attempts to assert a claim on two defunct companies. As shown by the chart submitted by the insurance companies, only one of the companies in America has a claim for as much as $150,000.00. The next highest is $98,356.00 and two of them have claims for only $31,250.00. The division among the London companies was somewhat different.

The evidence establishes that in 1858, Atlantic Mutual Insurance Company, the American company with the largest claim, and Sun Mutual Insurance Company, whose claim was $79,169.00, entered into a salvage contract with Brutus Villeroi dated July 28, 1858, for an attempted salvage of the gold from the Central America. The undertaking was to be by means of Villeroi's invention of a submarine boat at his own expense. The agreement provided the insurance companies would advance no funds, and under no circumstances were insurance companies to incur any expense or liability in connection with the attempted salvage. Nothing ever came of that undertaking. The record is totally void of any effort or activity on the part of any of the insurance companies to attempt to locate or recover the Central America. In fact, until 1979, there is no evidence of any contract between insurance companies and anyone relating to any interest in or any attempt to locate or recover the Central America. That contract is hereafter referred to. Insurance companies rely solely on the newspaper articles for the amount of insurance coverage, claims presented and payments made. Those articles indicate that the insurance companies stated they would pay the amounts of insurance due upon presentation of proper proof. The evidence established that the ordinary commercial transaction consisted of four documents which represent and take the place of the goods themselves in the financing of the transaction in past, current and all the markets of the world. They are (1) the invoice, the merchant's bill for the goods, (2) the Bill of Lading, the carrier's receipt for the goods, (3) Draft or Bill of Exchange, the merchant's payment, and (4) Insurance Certificate, the document of guarantee. The Bill of Lading describes the package, not the contents. The expert witness explained the transaction by saying the merchant takes his invoice, obtains the Bill of Lading and insurance certificate, draws a draft on the purchaser, encloses the draft with the other three documents attached and presents this to his banker who puts the draft in

process of collection. Hence, the proper proof required by an underwriter are the original bill of lading, the invoice, packing list if there was one, the insurance policy (or knowledge of its existence), and proof the goods were actually on board at time of sinking.

In this case, the insurance carriers have not been able to present an invoice, bill of lading, packing list, insurance certificate, statement from shipper that the goods were on board at time of sinking, cancelled checks or receipts showing payment of the claims or any other substantial documents or proof of their claims. Inasmuch as the news articles reported the insurance carriers had said they would pay the losses upon presentation of proper proof, and later news articles say claims were paid, it can be assumed the aforesaid documents or sufficient ones were obtained and presented. There were reports documents came by later shipments and that others were obtained from California, the point of origin for the lost shipment of gold.

The insurance carriers destroyed their records relating to the events of the Central America. Exactly when is not shown, but evidence establishes it was their custom to keep records for some five year periods, and thereafter destroy them. However, one expert on marine insurance testified that if a company intended to assert its right to subrogation, it always maintained its documents of proof of the claim and that it had paid the claim, and the fact it disposed of such documents was an indication it abandoned its claim. It is difficult to believe that a company claiming an asset or property worth $150,000.00 in the 1800's or even early 1900's would destroy all evidence of its claim if it had any intention to pursue it, or any hope of recovery. How could one better demonstrate their intention to abandon a claim to or interest in property than to intentionally destroy every evidence of its claim, right or title thereto. It seems more than

unusual that some eleven or more companies who have proof of what they say is an asset-or claim-and which they say they never abandoned, each destroyed all documents which established their right to the claim. None say they acci dentally destroyed or lost the documents. They deliberately destroyed every document that would in anyway show they had an interest in such a claim and had any intention to pursue it. Why? Their actions speak clearly. They had no hope or idea they could locate the Central America, and even if they located it, they had no hope they could recover anything from it. They destroyed the documents and intended thereby to abandon any claim they might have. Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the Central America. The inaction did not stop there. The record is void of any evidence that even up to this day any one of the insurance companies ever sought to locate or have a discovery company or group undertake to locate and recover the Central America. Even in 1979 when a group was discussing or planning a search for the Central America, there is no evidence any one of the insurance companies offered to join or assist them. The same continued through 1987 when Boston and Law undertook to have INA become a party to a search. Even the Salvage Association has offered no evidence of any action on its part to locate and find the Central America. This is true to this date even though there is substantial evidence that means of locating and recovering wrecks in deep water has been in use for more than twenty years. Even so, not one of the insurance companies have even

sought to contact any company or group with the idea of searching for or locating the Central America. The Salvage Association in London asserts it has been in existence for more than a hundred years for the purpose of salvaging shipwrecks, yet it has never undertaken to locate or recover the Central America, or have someone do so. Nor is there evidence any of the insurance companies or the Salvage Association ever made any inquiry of the availability of means or equipment to locate the Central America or undertake a recovery of it.

Even so, insurance companies now assert they never abandoned or ever intended to abandon their claim to the gold aboard the Central America. They ground their position in the contention they never signed any document so stating, never made any public announcement of abandonment and have always claimed to own the gold. But their actions-and failure of actions-speak louder than words. Only once—and that was less than a year after the loss—did they even evidence any interest in an attempted recovery, and even then refused to offer financial or any other type of assistance to that recovery group. When is not known, but they deliberately destroyed all documents that would establish they had any interest in the cargo—even failing to retain a cancelled check or receipt for payment. The destruction of their records confirms the fact they abandoned any intention to retain any interest in the gold. The insurers own evidence indicates they always retain documents as long as they believe they have an interest in any subrogated items. If there had been any intention not to abandon any thought or hope of recovery, it would seem that at least one of the insurers would have kept its records of their loss. However, the evidence establishes they did keep some records of their company for more than 100 years, but not of any claim to the Central America.

The Salvage Company attempts to assert a claim on behalf

of two defunct companies, as does the Superintendent of Insurance of the State of New York. However, neither of them assert that at the time each of those companies failed or ceased business, there was listed as an asset or claim any right of subrogation to an interest in the cargo of gold abroad the Central America. Why? They had no such claim. Any claim they may have ever had was previously abandoned. If it had not been previously abandoned, it surely was at that time.

In the past ten years, several groups were making a search for the lost Central America. Considerable publicity was given to these searches. Even after much publicity was given to the plaintiff's location and commencement of recovery from the Central America, not until September 1989 did insurers attempt to assert a claim.

While time alone may not be sufficient to establish abandonment, it is an element to be considered and when considered with all of the other evidence, it has convincing power. Once the insurance companies abandoned the Central America, whether it was because of lack of means or lack of hope for recovery, the abandonment was final. Merely because means are thereafter found to locate and recover it does not reinvest ownership in them. To now suggest that in 1859 or anytime up until World War II, that an insurance executive had any intention of claiming gold located one and one-half miles below the surface of the sea, and any hope of being able to locate such an object and recover it, by saying it was property of his insurance company is stretching common sense too far. Here, the Court is asked to assume this when that very insurance executive destroyed every evidence which his company had to such a claim. It is exceedingly doubtful that any of the now claiming insurance executives had any knowledge that their company ever had such a claim until commencement of this action. If they had such knowledge, they never gave any indication such a claim was viable and

had not been abandoned. If there is any executive, or anyone with any of insurer claimants, who ever heard his predecessor of the company indicate the company had a claim to any of the gold on board the Central America, he has not come forward with it. It is easy for present day persons to assert they did not and would not abandon a claim to gold in a shipwreck, knowing now the modern means for recovery-but they have not, and could not, say what their predecessors did or intended. Again, the actions-and failure to act-speak loudly.

During much of the middle and late 1800's and early 1900's, capital assets of corporations were assessed for taxes. That is, each item of real and personal property was to be valued. Hence, any personal property, gold, silver and so forth had to be reported. *See Jenkins v. Neff,* 163 N.Y. 320, 57 N.E. 408 (1900); *People v. Barker,* 144 N.Y. 94, 39 N.E. 13 (1894). Many states had similar laws. There is no suggestion that any one of the insurance companies ever listed as an asset, or as its property, any of the gold or a subrogation claim to any such gold.

In 1979, one Norman Scott of Expeditions Unlimited had some contacts with counsel for INA relative to an expedition to attempt to locate and recover items from the Central America. In a letter of April 16, 1980, Scott asserted that a group from Orlando, Florida had funded an attempt to locate the Central America. He said they had found a ship which might well be the Central America and they had returned to the site three or four times in attempts to make such determination, but attempts had not established it was or was not the Central America. He points out that if the ship is in two to three thousand feet of water, the cost of recovery will exceed one million dollars. He suggested that if private funding did not come forward, the insurance companies should contribute to the cost of the search. Nothing fur[illegible]er

seems to have come of that discussion, nor is there any evidence the insurance companies showed or took any interest in the undertaking. By letter of November 4, 1987, counsel for S.S. George Law Limited Partnership and Boston Salvage Consultants, Inc. sought the cooperation and assistance of INA in an effort to locate and recover the Central America. Attached to that letter was a requested sale and transfer by INA to Law and Boston of any rights which INA had in the Central America for the consideration of 2% of the net proceeds from any recovery of the Central America. The project was not to cost INA anything. The assignment said the Central America was lying 200 miles off the coast of Georgia. The letter set forth that Law and Boston wanted the assignment because they thought it was in their interest to appear in an action pending in Norfolk, Virginia, (which was this suit), as a claimant of the vessel and cargo. INA did not sign the document. However, Law and Boston did appear in this litigation in 1987, to oppose plaintiff's application for the injunction. Thereafter, they dismissed their claim. Hence, as early as July 1987, INA knew there was litigation relative to the Central America and possible claims, yet neither it nor any of the other insurance companies appeared or sought to assert any right, title or interest in the Central America.

Insurers, on one hand, assert they were subrogated to the title and ownership of all of the gold aboard the Central America. On the other hand, they admit there were persons aboard who were carrying substantial amounts of gold with them which was not insured. Hence, even if insurers did not abandon their claim or title to the insured gold, and were fully subrogated to the rights of the shippers, they have no standing to claim all of the gold aboard. Numerous news reports gave the names of individuals aboard who were carrying substantial quantities of gold. One of the experts testified that between three hundred thousand and a million dollars was carried by

passengers; that small amounts were carried on the person,[6] larger amounts carried in carpet bags, large bags and trunks, and some individuals deposited their gold with the Purser. Too, the expert testified one commercial shipper did not insure his gold. The expert for the insurance companies also testified that reports of personal gold were as high as $400,000.00. He likewise confirmed much of the testimony of the plaintiff's expert.

Clearly, there were substantial sums of gold aboard the Central America other than the sums covered by insurance. Accounts fix the quantity of gold on board and going down with the ship as between one million, six hundred thousand up to two million dollars. Insurers do not contend they insured such a quantity and now agree that they did not insure all of the gold aboard.

The news accounts list Lloyd's of London as one of the insurers. It is made up of in excess of one thousand individuals. None of them has appeared to assert a claim. Too, some of the insurance companies have ceased to exist. The Salvage Company asserts it is the successor to those from London, but there is no proper document assigning any such claim. Even if the insurance companies did not abandon their claims, they would not be entitled to the total gold recovered. Too, there is no credible record of the exact composition of each shipment, whether bars, coin, dust or otherwise. More than likely, there will be no recovery of any gold dust.

Insurers say that insurance companies do not abandon cargo worth $150,000.00. It is true that few companies or

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[6] There were one or two newspaper accounts of passengers carrying from two to ten thousand dollars in money belts, and one had 20 thousand in a carpet bag.

individuals would abandon claims for such a sum, if there was any hope or likelihood of locating and recovering such cargo. Equally as true is the fact that if the company ever had any intention or hope of asserting or pursuing a claim to such cargo, it would certainly not have destroyed all evidence of its claim or right thereof. However, where the whereabouts of the property is unknown, and there is no known way to locate or reach it or if the cost of attempted recovery exceeds the value, the situation changes. The attitude and intentions of business people are expected to be, and generally are, rational. They don't hold on to a claim when it is impos sible to recover it or where it has no value. A clear intention of abandonment is given when all records or memorandum of the property are deliberately destroyed and no effort is made or undertaken to locate or recover the property for over a hundred years.

Considering all of the facts and circumstances in the case, the Court is satisfied that plaintiff has carried its burden of establishing by clear and convincing evidence that each of the insurance companies long ago abandoned any claim, right, title or interest that they may have had in the gold aboard the Central America.

They therefore have no claim to any of the gold recovered from the Central America. Accordingly, the claims of the insurance companies and the claims of Trustees and John and Grimm are DISMISSED. Plaintiff is entitled to and is vested with the ownership to all of the gold or other artifacts recovered from the Central America.

APPENDIX D

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.
Respondent.

No. 92-1189

Case below, *Columbus-America Discovery Group, Inc. v. Sailing Vessel*, 742 F. Supp 1327; 974 F.2d 450.

March 22, 1993. The motion of National Association of Academies of Science for leave to file a brief as *amicus curiae* is granted. The motion of Florida Bar Admiralty Law Committee for leave to file a brief as *amicus curiae* is granted. The motion of Ohio State University for leave to file a brief as *amicus curiae* is granted. The motion of Columbus Museum of Art for leave to file a brief as *amicus curiae* is granted. The motion of Ohio Academy of Science for leave to file a brief as *amicus curiae* is granted. The motion of Teachers and Administrators of Secondary Schools, et al., for leave to file for leave to file a brief as *amicus curiae* is granted. The motion of Explorers Club for leave to file a brief as *amicus curiae* is granted. The motion of Battelle Memorial Institute for leave to file a brief as *amicus curiae* is granted. The motion of Marine Technology Society for leave to file a brief as *amicus curiae* is granted. The motion of Ohio Historical Society for leave to file a brief as *amicus curiae* is granted. The motion of National Maritime Historical Society for leave to file a brief as *amicus curiae* is

granted. The motion of Titanic International, Inc., et al. for leave to file a brief as *amicus curiae* is granted. The motion of Adjunct Science and Education Association for leave to file a brief as *amicus curiae* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2120

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellant,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; JACK F. GRIMM; JOANNE LAMPE CHARLTON, Personal Representative of the Estate of Harry G. John,
Intervenor-Plaintiff,

versus

ATLANTIC MUTUAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY, LIMITED; ROYAL INSURANCE COMPANY, LIMITED; SUN ALLIANCE GROUP; GRE OF AMERICA CORPORATION; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellees,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude, (believed to be the S. S. Central America), *in rem*;

Defendant,

THE INSURANCE COMPANY OF NORTH AMERICA; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SALVAGE ASSOCIATION; UNDERWRITERS AT LLOYD'S; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LIMITED; GUARDIAN ROYAL EXCHANGE; ROYAL EXCHANGE ASSURANCE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; INDEMNITY MARINE ASSURANCE COMPANY, LIMITED; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LIMITED; MARINE INSURANCE COMPANY, LIMITED; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew, and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONTDOHERTY

GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INCORPORATED,

Claimants.

No. 98-2198

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellant,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; JACK F. GRIMM; JOANNE LAMPE CHARLTON, Personal Representative of the Estate of Harry G. John,

Intervenor-Plaintiff,

versus

ATLANTIC MUTUAL INSURANCE COMPANY; COMMERCIAL UNION ASSURANCE COMPANY, LIMITED; ROYAL INSURANCE COMPANY, LIMITED; SUN ALLIANCE GROUP; GRE OF AMERICA CORPORATION; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Claimants-Appellees,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude, (believed to be the S. S. Central America), *in rem*;

Defendant,

THE INSURANCE COMPANY OF NORTH AMERICA; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SALVAGE ASSOCIATION; UNDERWRITERS AT LLOYD'S; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LIMITED; GUARDIAN ROYAL EXCHANGE; ROYAL EXCHANGE ASSURANCE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; INDEMNITY MARINE ASSURANCE COMPANY, LIMITED; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LIMITED; MARINE INSURANCE COMPANY, LIMITED; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew, and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY

GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INCORPORATED,

Claimants.

ORDER

Atlantic Mutual Insurance Co., et al., the underwriters in these cases, filed their petition for rehearing in these cases on February 18, 2000.

Columbus-America Discovery Group, Inc. filed its petition for rehearing in these cases on February 22, 2000. While the said petition of Columbus-America only spoke to rehearing en banc, we consider it was also addressed to the panel.

No request for a poll of the court on the petitions for rehearing en banc has been made.

It is accordingly ADJUDGED and ORDERED that both of the above mentioned petitions for rehearing en banc shall be, and they hereby are denied.

The panel has considered both of the petitions for rehearing and are of opinion they are each without merit.

It is accordingly ADJUDGED and ORDERED that both of the above mentioned petitions for rehearing shall be, and they hereby are, denied.

With the concurrences of Judge Williams and Judge Michael.

/s/ H. E. Widener, Jr.

For the Court

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No.90-2730
CA-87-363-N

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF
NEW YORK; HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

v.

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Claimants-Appellants,

and

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary-31 degrees 33 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be in the S.S. Central America), *in rem*,

Defendant,

CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED

CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT-DOHERTY GEOLOGICAL INSTITUTE; S. S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS;
THE BOARD OF UNDERWRITERS OF NEW YORK,

Amici Curiae.

No.90-2731
CA-89-62 6-N

HARRY G. JOHN; JACK F. GRIMM,

Plaintiffs-Appellants,

COLUMBUS-AMERICA DISCOVERY GROUP,

Plaintiff-Appellee,

and

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiff,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA;

SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE COMPANY, INCORPORATED; ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF

TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants.

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel, appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 83 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes West Longitude, (believed to be in the S.S. Central America), *in rem,*

Defendant,

AMERICAN INSTITUTE OF MARINE UNDERWRITERS;
THE BOARD OF UNDERWRITERS OF NEW YORK,
Amici Curiae.

No.90-2782
CA-8 7-368-N

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
Plaintiff-Appellant,

COLUMBUS-AMERICA DISCOVERY GROUP,
Plaintiff-Appellee,

and

HARRY G. JOHN; JACK F. GRIMM,
Plaintiffs,

ATLANTIC MUTUAL INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; SALVAGE ASSOCIATION; LONDON ASSURANCE; ALLIANCE ASSURANCE COMPANY, LTD.; ROYAL EXCHANGE ASSURANCE; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; MARINE INSURANCE COMPANY, LTD.; SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK; CIGNA GROUP, COMMERCIAL UNION ASSURANCE COMPANY, LTD.; COMMERCIAL UNION INSURANCE COMPANY; WILLIAM H. MCGEE & COMPANY, INCORPORATED;

ROYAL INSURANCE; ROYAL INSURANCE COMPANY, LTD.; ROYAL INSURANCE COMPANY OF AMERICA; CHUBB & SON, INCORPORATED; SUN ALLIANCE GROUP; UNDERWRITERS AT LLOYD'S; GRE OF AMERICA CORPORATION; GUARDIAN ROYAL EXCHANGE; INDEMNITY MUTUAL MARINE ASSURANCE COMPANY; SUN INSURANCE COMPANY OF NEW YORK; SUN INSURANCE OFFICE, LTD.; GREAT WESTERN INSURANCE COMPANY; SUN MUTUAL INSURANCE COMPANY; UNION MUTUAL INSURANCE COMPANY; ORIENTAL MUTUAL INSURANCE COMPANY; COMMERCIAL MUTUAL INSURANCE COMPANY; MERCANTILE MUTUAL INSURANCE COMPANY; NEW YORK MUTUAL INSURANCE COMPANY; PACIFIC MUTUAL INSURANCE COMPANY; INDEMNITY MARINE; LONDON ASSOCIATED CORPORATION; ROYAL ASSOCIATED CORPORATION; ROYAL MARINE; INDEMNITY MUTUAL; ROYAL EXCHANGE & LONDON OFFICES; UNION BANK OF LONDON; COMMONWEALTH FIRE INSURANCE COMPANY; DENNIS STANDEFER; THE R/V LIBERTY STAR, her master, officers, crew and all persons aboard; BOARD OF TRUSTEES OF COLUMBIA UNIVERSITY; LAMONT - DOHERTY GEOLOGICAL INSTITUTE; S.S. GEORGE LAW PARTNERSHIP; BOSTON SALVAGE CONSULTANTS, INC.,

Claimants,

v.

THE UNIDENTIFIED WRECKED AND ABANDONED SAILING VESSEL, its engines, tackle, apparel,

appurtenances, cargo, etc., located within a box defined by the following coordinates: Northern Boundary—31 degrees 37 minutes North Latitude; Southern Boundary—31 degrees 40 minutes North Latitude; Western Boundary—77 degrees 2 minutes West Longitude; Eastern Boundary—76 degrees 57 minutes west longitude, (believed to be in the S.S. Central America), *in rem*,

Defendant.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS;
THE BOARD OF UNDERWRITERS OF NEW YORK,
Amici Curiae.

[Filed October 15, 1992]

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellee filed a petition for rehearing with suggestion for rehearing in bane and appellants filed answers to the petition. A member of the Court requested a poll on the suggestion for rehearing in bane, and a majority of the judges voted to deny rehearing in bane. Judges Widener, Hall, Sprouse, Murnaghan and Wilkins voted to rehear the case in banc, and Chief Judge Ervin, Judges Russell, Phillips, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in bane. Judge Wilkinson disqualified himself from participation.

The original judicial panel voted to deny the petition for rehearing.

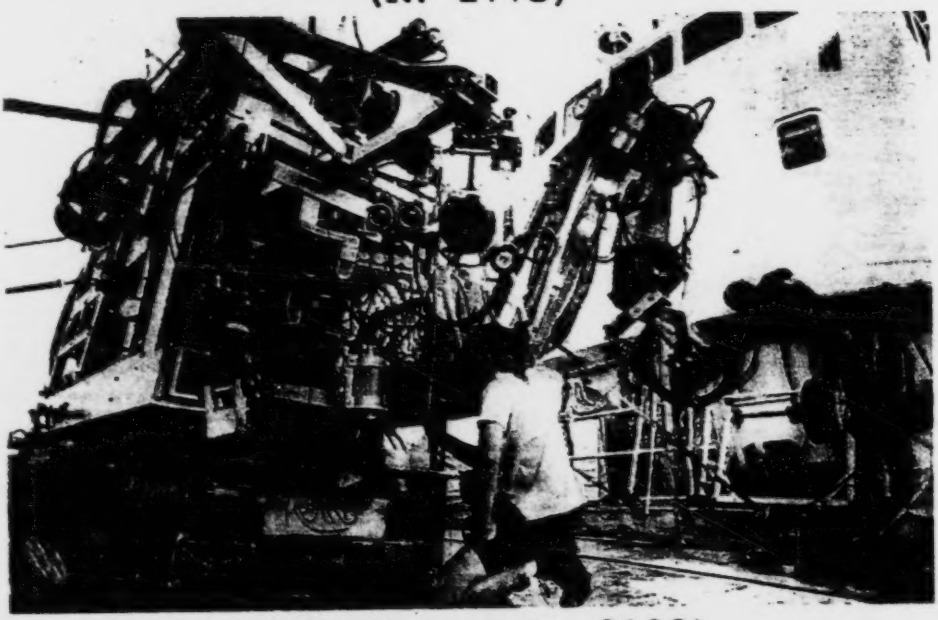
The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Hall. Judge Widener dissents.

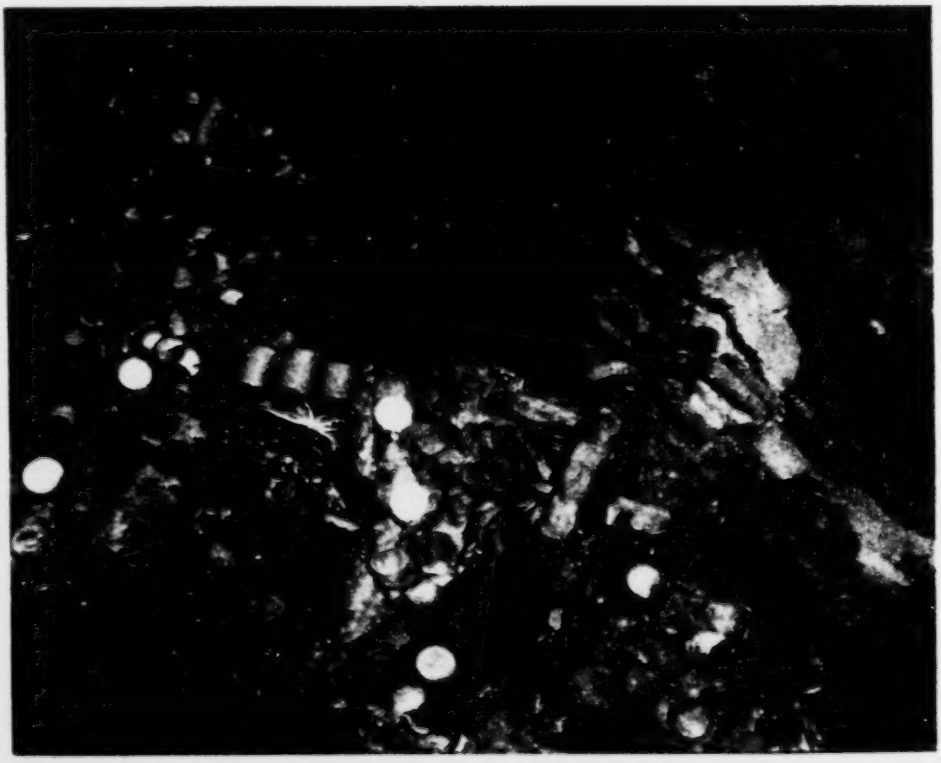
For the Court,

/s/ Bert M. Montague Clerk

(R. 1773)



(4th Cir. J.A. 3108)



(4th Cir. J.A. 3059)

Supreme Court, U.S.
FILED
JUN 30 2000
CLERK

No. 99-1935

IN THE

Supreme Court of the United States

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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39pp

QUESTIONS PRESENTED

1. Should this Court review the Petition for a Writ of Certiorari after this litigation was settled in accordance with a Settlement Agreement and Dismissed Agreed Order in which all claims and issues between the parties were dismissed with prejudice?

2. By accepting the benefits of the Settlement Agreement and Dismissed Agreed Order, and selling the *res* it was awarded, does the Petitioner have standing to now request the Supreme Court to review the admiralty law test for abandonment of property as it was applied by the Fourth Circuit in this case in 1992?

3. Does the law of the case doctrine preclude reconsideration of the decision rendered by the Fourth Circuit in 1992 in which this Court denied *certiorari* in 1993?

4. Should this Court review the admiralty law test for an abandonment of property when there is no conflict among the circuits and this Court, in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 528 (1998), conclusively provided the meaning of "abandoned" under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106?

5. Should this Court consider the Petition for a Writ of Certiorari when the relief requested will rewrite the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106?

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The following are the Respondents and their corporate affiliations:

Atlantic Mutual Insurance Company has no parent company and no publicly held company owns ten percent or more of its stock.

Royal & Sun Alliance Insurance Company plc is the parent company of the London Assurance, Alliance Assurance Company, Ltd. and Marine Insurance Company, Ltd. No publicly held company owns ten percent or more of the stock of these Respondents.

CGU International Insurance plc is the parent company of Indemnity Marine Insurance, Ltd. No publicly held company owns ten percent or more of the stock of this Respondent.

Axa Insurance plc is the parent company of Royal Exchange Assurance. No publicly held company owns ten percent or more of the stock of this Respondent.

Superintendent of Insurance of the State of New York.

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Appendix C — Letter From Richard K. Howell, Rutan & Tucker, LLP To George Daly, Bigham, Englar, Jones & Houston Dated February 1, 2000 ..... 5a

Atlantic Mutual Insurance Company, *et al.* (hereinafter "Respondents" or "Underwriters"), respectfully submit this brief in opposition to the Petition for a Writ of Certiorari filed by the Columbus-American Discovery Group, Inc. (hereinafter "Petitioner" or "CADG"). The Petition raises no issues that merit review.

STATEMENT OF JURISDICTION

There is no jurisdictional basis for granting the Petition for a Writ of Certiorari. The Court of Appeals for the Fourth Circuit remanded this case to the district court to re-enter a Dismissed Agreed Order which confirmed the parties Settlement Agreement and dismissed all claims and issues in the litigation with prejudice. Because the Petition does not seek to set aside the Settlement Agreement or vacate the Dismissed Agreed Order there is no case or controversy pending for review and thus there is no jurisdiction in this Court. Furthermore, there is no conflict among the United States Courts of Appeals and this case does not involve an important question of federal law. *See* Sup. Ct. R. 10 (a)-(c).

COUNTERSTATEMENT OF THE CASE

In 1988 CADG discovered the sunken wreck of the S.S. CENTRAL AMERICA and in 1989 brought an *in rem* proceeding in the United States District Court for the Eastern District of Virginia to assert its ownership of, or, in the alternative, a salvage lien on the insured cargo of gold aboard the vessel when it sank off the coast of South Carolina in 1857. In September 1989, the original Underwriters, or their successors in interest who paid claims and became the subrogated owners of the commercial shipment of gold, intervened in the *in rem* proceeding and asserted their

ownership interest. (Pet. App. 6a-7a). The district court ruled that the Underwriters had intentionally destroyed their file documents which evidenced an abandonment of their interests in the commercial shipment of gold. *Columbus-America Discovery Group, Inc. v The Unidentified Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1348 (E.D. Va. 1990). (Pet. App. 95a, 129a-139a). On appeal, the Fourth Circuit reversed the district court's finding that the Underwriters intentionally destroyed their documents as clearly erroneous, and held that there was no evidence that the Underwriters had abandoned their title to the cargo. *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 466 (4th Cir. 1992), *rehearing en banc denied, cert. denied*, 507 U.S. 1000 (1993). (Pet. App. 30a, 62a-63a). In finding that the district court erred in applying the law of finds, rather than the law of salvage, the Fourth Circuit stated:

> Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment.

974 F.2d at 464-465. (Pet. App. 59a-60a; 66a).

At the trial following remand by the Fourth Circuit, CADG was granted a salvage award of 92.2 percent of the value of the treasure insured by the Underwriters. (Pet. App. 8a). In making the award the district court applied the traditional law of salvage and found that the Underwriters

had proved by clear and convincing evidence ownership of the *res*. The court also directed that the *res* be sold to liquidate CADG's salvage lien and appointed CADG as the "Central Marketing Authority" to market and sell the entire treasure under the direction of the district court. (Pet. App. 8a-9a). Following an appeal of the district court's decision the salvage award was affirmed by the Fourth Circuit. *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 56 F.3d 556 (4th Cir. 1995), *cert. denied*, 516 U.S. 938 (1995).

Because in the intervening years CADG failed to market the *res* and keep the court informed of its actions, on May 4, 1998, the district court removed CADG as the Central Marketing Authority stating that CADG had acted with a "lack of integrity" in violating the court's orders. (Pet. App. 10a).

Shortly thereafter, on May 19, 1998, the parties entered into a final Settlement Agreement which provided for a division of the treasure *in specie* and for the parties to endorse a confirmation "Dismissed Agreed" Order dismissing "all claims of the parties with prejudice." (Pet. App. 10a-11a, 19a).[1]

Pursuant to the Settlement Agreement, CADG and the Underwriters physically divided the treasure on June 17, 1998. (Pet. App. 11a). On June 23, 1998, the district court

---

1. Because certain records were sealed in the underlying proceedings by the district court and the Fourth Circuit, the Respondents have simultaneously filed with the Clerk's office a Motion for Leave to File Lodgings Under Seal. The Settlement Agreement is included in this sealed material. The Dismissed Agreed Order was previously unsealed by the district court and is attached to the Respondent's Appendix ("Res. App.") at pages 1a-2a.

entered the Dismissed Agreed Order, previously signed by the parties, dismissing all claims with prejudice. (Pet. App. 11a-12a, 17a; Res. App. 1a-2a). As contemplated by the Dismissed Agreed Order, title to the items CADG selected during the *in specie* division was transferred to CADG free and clear of all liens and encumbrances in satisfaction of its salvage lien.[2] (Pet. App. 10a-24a; Res. App. 1a-2a).

To preserve jurisdiction of any further salvage operations contemplated by CADG, the district court on July 1, 1998 entered a second order in which it amended the Dismissed Agreed Order of June 23, 1998 "to the extent it dismisses this *in rem* action against the Defendant wreck." (Pet. App. 12a).

On July 23, 1998, CADG appealed to the Fourth Circuit from the orders entered June 23, and July 1, 1998 with a request that the Settlement Agreement be declared void and the parties returned to the status quo. (Pet. App. 12a-13a). After briefs were filed, the Fourth Circuit heard oral argument on March 2, 1999.

On or about December 8 and 9, 1999, while its appeal to the Fourth Circuit was pending, CADG sold and conveyed title to its entire 92.2 percent of the treasure it received under the Settlement Agreement to the California Gold Marketing Group. (Res. App. 3a-6a). Thereafter, CADG's share of the treasure was resold by the California Gold Marketing Group to various coin dealers who have resold the treasure to the public. (Res. App. 3a-6a, Lodging App. L1-L12) Because CADG has divested itself of title to the 92.2 percent of the treasure the parties cannot be restored to the status quo which existed prior to the Settlement Agreement.

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2. As a salvor CADG had a lien on the treasure owned by Underwriters prior to the settlement.

On February 8, 2000, the Fourth Circuit concluded that the Dismissed Agreed Order of June 23, 1998 confirming the parties' Settlement Agreement was properly entered, and it vacated the order filed July 1, 1998. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 302 (4th Cir. 2000) (Pet. App. 1a-29a). The court also refused to set aside the 1992 Opinion of the Fourth Circuit in this case which held the Underwriters had not abandoned their rights to the treasure. (Pet. App. 26a-29a). CADG's petition for rehearing and rehearing *en banc* were denied on March 7, 2000. (Pet. App. 142a-147a). On March 15, 2000, the Fourth Circuit issued its mandate to the district court and on April 27, 2000 the district court re-entered the Dismissed Agreed Order of June 23, 1998 as required by the mandate.

In its Petition for a Writ of Certiorari, CADG did not request this Court to set aside the Settlement Agreement or vacate the Dismissed Agreed Order that dismissed "all claims, matters and issues raised in this case" with prejudice. (Pet. App. 19a; Res. App. 1a-2a). It is apparent that the actions of the Petitioner have resolved all claims and issues in controversy and there are no issues to be considered by this Court.

SUMMARY OF THE ARGUMENT

1. The Petition for a Writ of Certiorari is moot because this case was settled in 1998 and, pursuant to the settlement, the Petitioner received title to 92.2 percent of the treasure salvaged from the S.S. CENTRAL AMERICA in satisfaction of its salvage lien, and all claims between the parties were dismissed with prejudice, including the question presented by Petitioner in its Petition for a Writ of Certiorari. Thereafter, and during the appeal of the Settlement Agreement to the Fourth Circuit, Petitioner sold the treasure

it received by virtue of the Settlement Agreement and Dismissed Agreed Order to various third parties. Since Petitioner has voluntarily accepted the benefits of the settlement of all claims and issues in this litigation, there are no issues open for this Court to consider.

2. Petitioner's request for reconsideration of the admiralty law test for an abandonment of property violates the law of the case doctrine. The issue of abandonment was fully litigated in the first trial and the first appeal in this case. In 1992, the Fourth Circuit found that the district court clearly erred in finding there was an abandonment. *Columbus-America*, 974 F.2d at 468. (Pet. App. 66a). In 1993, this Court denied CADG's Petition for a Writ of Certiorari on the abandonment issue. 507 U.S. 1000 (1993). (Pet. App. 140a). Petitioner has no right to relitigate an issue that was conclusively decided in this case nearly eight years ago.

3. There is no conflict among the circuits on the issue of abandonment considered in the 1992 decision of the Fourth Circuit as suggested by Petitioner. More significantly, this Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998), conclusively decided the meaning of "abandoned" under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106. CADG's contention of a divergence among the circuits is unfounded.

REASONS FOR DENYING THE WRIT

I.

BECAUSE PETITIONER SOLD THE SHARE OF TREASURE IT RECEIVED UNDER THE SETTLEMENT AGREEMENT, ITS PETITION FOR A WRIT OF CERTIORARI IS MOOT

On December 8, 1999, the Petitioner conveyed title to the entire portion of the treasure it received under the Dismissed Agreed Order to a third party, the California Gold Marketing Group. (Lodging App. L1-L12).[3] [4] Because CADG sold its share of the *res* received by virtue of the Settlement Agreement and Dismissed Agreed Order, and accepted the benefits of the Settlement Agreement and Dismissed Agreed Order, it is without standing to now request the Supreme Court to review the admiralty law test for the abandonment of property as it was applied by the Fourth Circuit in this case in 1992. *Columbus-America*, 974 F.2d at 468. (Pet. App. 30a).[5] It is well established that CADG cannot accept the

3. *See also* paragraphs 16 and 17 of CADG's Motion for Emergency Relief filed in the Fourth Circuit on February 2, 2000. A copy of this Motion has been simultaneously submitted with Respondent's Motion for Leave to File Lodgings Under Seal.

4. The California Gold Marketing Group has also confirmed to counsel for the Underwriters that it purchased CADG's entire 92.2% share of the overall treasure and has already resold a large portion of it. (Res. App. 3a-6a).

5. Specifically, CADG would like this Court to review the Fourth Circuit's 1992 opinion in this case and adopt the dissenting opinion's abandonment test from that decision. (Pet. App.73a-94a).

(Cont'd)

benefits of the Dismissed Agreed Order and then seek review in a higher Court:

> No rule is better settled than that a litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court.

Spanel v. Berkman, 171 F.2d 513, 515 (7th Cir. 1948) (*quoting Albright v. Oyster*, 60 F. 644 (8th Cir. 1894)); *see Smith v. Morris*, 69 F.2d 3, 4 (3d Cir. 1934) (right of appeal waived by accepting and retaining fee allowed by order appealed from). In *Fidelcar Mortg. Corp. v. Ins. Co. of No. Am.*, 820 F.2d 367 (11th Cir. 1987), the Eleventh Circuit reiterated that "when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives the right to appeal from an otherwise adverse judgment." *Id.* at 370 (*citations omitted*).

All claims and issues in this lawsuit were settled upon the entry of the Dismissed Agreed Order all of which were dismissed with prejudice. Since all claims and issues were concluded, the Petition for a Writ of Certiorari is mooted by CADG's acceptance of the treasure as provided by the Settlement Agreement and Dismissed Agreed Order. By

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(Cont'd)

Not only will this vitiate the law of the case doctrine, but CADG previously filed a Petition for a Writ of Certiorari to this Court on that exact issue which was denied seven years ago. *See* 507 U.S. 1000 (1993) (Pet. App. 140a). The issue is moot.

selling the treasure to which it received title, CADG ratified and confirmed that all matters relating to this litigation had been concluded.[6] Because there is no claim or issue in controversy pending, the Underwriters respectfully request that the Court dismiss the Petition for a Writ of Certiorari.[7]

II.

RECONSIDERATION OF THE ABANDONMENT ISSUE VIOLATES THE LAW OF THE CASE DOCTRINE

CADG asserts that it preserved its objection to the majority opinion in *Columbus-America*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), to seek reconsideration of the abandonment issue. (Pet. App. 11). CADG has no right, however, to relitigate this issue that was conclusively decided by the Fourth Circuit in the first appeal in this case more than eight years ago. To do so will violate the law of the case doctrine, which has long been recognized by this Court as a fundamental principle of our judicial system.

> No principle is better settled, or of more universal application, than that no court can reverse or annul is own final decrees or judgments, for errors of

---

6. It should be noted that CADG cannot request the Court to set aside the Settlement Agreement and Dismissed Agreed Order because it has sold the treasure it received and cannot return matters to the status quo, that existed prior to the settlement when CADG was only a lienholder of the treasure owned by the Underwriters.

7. The Underwriters also sold the portion of the treasure they received by virtue of the Settlement Agreement and Dismissed Agreed Order.

> fact or law, after the term in which they have been rendered unless for clerical mistakes.

Sibbald v. United States, 12 Pet. 488, 492 (1838).

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) (*quoting Arizona v. California*, 460 U.S. 605 (1983)). Once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case, *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991), including those by the appellate court which rendered the first decision. *See Knotts v. United States*, 893 F.2d 758, 761 (5th Cir. 1990). In *United States v. Monsisvais*, 946 F.2d 114 (10th Cir. 1991), the court stated:

> when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand. *If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.*

Id. at 116 (emphasis added) (citation omitted).

In *Columbus-America*, the Fourth Circuit in 1992 explicitly found that the district court clearly erred in finding that there was an abandonment. 974 F.2d at 468. Any variation from this ruling violates the law of the case doctrine. The Supreme Court has stated that the law of the case

doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson*, 486 U.S. at 816 (*quoting* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* P0.404[1], p. 118 (1984)). *See also Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989) (the law of the case "is a rule based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided") (citations omitted).

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Arizona v. California, 460 U.S. 605, 619 (1983) (*quoting Montana v. United States*, 440 U.S. 147,153-154 (1979)).

The issue of abandonment was fully litigated in the first trial and the first appeal in this case. Since the Fourth Circuit's ruling in 1992, the parties have engaged in expensive and protracted litigation including three petitions for a writ of *certiorari* to the United States Supreme Court, a second trial to determine the salvage award, three subsequent appeals to the Fourth Circuit, and numerous proceedings before the district court to determine the percentages of ownership of each underwriter and to enforce the marketing of the *res*. All of these years of litigation will have been in vain if the law of this case is not followed. Furthermore, such a result is manifestly unjust, particularly

where, as here, the parties settled all claims under a Settlement Agreement, which was fully performed, and the case was dismissed pursuant to a Dismissed Agreed Order endorsed by both parties.

In *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987), the Eleventh Circuit stated:

> The law of the case doctrine, self-imposed by the Courts, operates to create efficiency, finality and obedience within the judicial system . . . Due process, as a constitutional value, may be the cornerstone, but finality and stability, as institutional value, may be of equal importance. While the law of the case doctrine is not an "inexorable command," adherence to it helps to ensure that the essential elements are maintained in the process. Failure to honor its commands can only result in chaos.

Id. at 1511 (footnotes and citations omitted). If the law in this case is ignored, it will undermine the judicial system and result in chaos. In order for this Court to reverse the Fourth Circuit's 1992 decision on abandonment, it will necessarily put aside the sanctity of contract by invalidating the Settlement Agreement and ignore the constitutional cornerstone of finality, stability and law of the case.

III.

THERE IS NO DISPUTE BETWEEN THE CIRCUITS AS TO THE LAW OF ABANDONMENT AND THE BURDEN OF PROOF

CADG's entire claim that a conflict exists between the circuits is based exclusively on the views Judge Widener stated in this case at 203 F.3d 291, 304 (4th Cir. 2000).[8] As will be clearly demonstrated, a conflict does not exist in the decisions of the Sixth and Ninth Circuits as suggested by Judge Widener.

Specifically, Judge Widener states:

> A comparison of our earlier decision in this case in 974 F.2d 450 with the decision of the Supreme Court and the Ninth Circuit in *The Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the *rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in Brother Jonathan.*

203 F.3d at 304 (Pet. App. 28a) (emphasis added).

Judge Widener relies on two decisions, *Deep Sea Research, Inc. v. The Brother Jonathan,*[9] 102 F.3d 379

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8. Judge Widener was the dissenting judge in the Fourth Circuit's 1992 opinion in this case at 974 F.2d 450 and is the only living member of that Panel.

9. On remand, the Ninth Circuit vacated the judgment in its entirety except for the jurisdiction question and remanded the case (Cont'd)

(9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds, and remanded,* 523 U.S. 491 (1998); and *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem,* 105 F.3d 1078 (6th Cir. 1997), *aff'd on jurisdiction and vacated and remanded on all other grounds,* 523 U.S. 1091 (1998), both of which were vacated and remanded by the United States Supreme Court with respect to the definition of abandonment and the standards to determine abandonment.[10] This Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) explained:

> There remains the issue whether the courts below properly concluded that the *Brother Jonathan* was not abandoned for purposes of the ASA [Abandoned Shipwreck Act]. That conclusion was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the court's inquiry. The Court of Appeals' determination that the wreck and its contents are not abandoned for purposes of the ASA was affected by concerns that if "the vessel had been partially abandoned, both the federal court and the state court would

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(Cont'd)
to the district court. *Deep Sea Research, Inc. v. The Brother Jonathan*, 143 F.3d 1299 (9th Cir. 1998). *The New York Times* reported that the case settled with salvors, who had obtained underwriter's subrogated interest receiving 80 percent of the treasure. (Lodging App. L13)

10. The Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* both dealt with the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106. The S.S. CENTRAL AMERICA was not subject to that act.

> be adjudicating the fate of the *Brother Jonathan*." *102 F.3d at 389*. Moreover, the District Court's inquiry was a preliminary one, based on the concern that it was premature "for the court to find that any individual items of cargo or personal property have been abandoned." *883 F.Supp. at 1354*. In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the *Brother Jonathan* in federal court, the application of the ASA must be reevaluated. *Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.*[11]

523 U.S. at 508 (emphasis added).

The *Fairport* decision on remand is reported at 177 F.3d 491 (6th Cir. 1999). The following statements from the Sixth Circuit on remand clearly demonstrate that no conflict exists between the circuits:

> We think that the apparent divergence of authority [between the Fourth and the Sixth and Ninth Circuits] *masks a degree of underlying agreement.* A close reading of the cases reveals a uniform

11. CADG and Judge Widener incorrectly reported the effect of the Supreme Court's decision as vacating the Ninth Circuit and Sixth Circuit's opinions "on other grounds." As the Court will note the specific reason for the remand in each case was the issue of abandonment.

concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will. *To overcome this significant hurdle, the claimant may prove abandonment by inference as well as by express deed. This proposition finds support even from those cases cited as examples of the doctrine of "express abandonment." See, e.g., Columbus-America, 974 F.2d at 464-65.* ("Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost [sic] shipwreck, a court may infer an abandonment."); *Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F.Supp. 452, 456 (E.D. Va. 1960).* ("While lapse of time and nonuser [sic] are not sufficient, in and of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon."). Once these opinions recognize an exception to a rule of express abandonment, the question becomes after what length of years may a court infer abandonment; rather than draw arbitrary (time) lines separating express from implied tests, we choose to view length of time as one factor among several relevant to whether a court may infer abandonment.

We agree that lapse of time, alone, does not necessarily establish abandonment, *see e.g., Wilkie, 29 F.Cas. at 1247*, and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a

> combination of several facts, proved clearly and convincingly, *see* Part III.C *infra*, may support a finding that an owner has abandoned a shipwreck.

177 F.3d at 499-500 (emphasis added).

> Proof by inference still requires proof, not conjecture – a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment.

Id. at 500.

> The uniform rule in admiralty law is that a finding of abandonment requires proof by clear and convincing evidence. *See, e.g., Columbus-America Discovery Group, 974 F.2d at 467-68* ("When a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved with clear and convincing evidence."); *Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145 (S.D.Ala. 1997).* ("Abandonment must be proven by clear and convincing evidence . . ."); *Moyer, 836 F.Supp. at 1104-05* (requiring proof of abandonment by clear and convincing evidence); *cf. Ries v. Thiesse, 61F.3d 631 (8th Cir. 1995)* (requiring creditors to prove by clear and convincing evidence a debtor's abandonment of a homestead).

Id. at 501.

> The *Fairport I* and *Brother Jonathan* district courts also recognized that, if no jurisdictional defense applies, maritime law requires proof by clear and convincing evidence. *See Brother Jonathan, 883 F.Supp. at 1351* ("Finally, the finding of abandonment must be supported by strong and convincing evidence."); *Fairport I 913 F.Supp. at 558 (citing Columbus-America 974 F.2d 450 at 468)*. The district courts rejected the admiralty standard only because they applied a burden of proof appropriate for assertions of sovereign immunity. . . . The court should consider whether Michigan can prove that it owns the shipwreck – that is, whether clear and convincing evidence shows that Behrens abandoned the *Captain Lawrence*. This burden of proof accords with maritime law and with the protection of private property rights against appropriation by the state.

Id.

The Ninth Circuit's decision in the only other case dealing with ancient shipwrecks, *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000), upheld underwriter's ownership rights to a long lost cargo of gold. Although the court did not annunciate a standard, a reading of the decision makes it clear that it does not support Petitioner's assertion of a conflict between the circuits.

A. The So-Called Conflict is a Fiction Created by Petitioner

To create a "conflict between the circuits", the Petitioner has cited on pages 17 and 18 in its brief opinions by various courts where *no one* appeared and claimed ownership to the property found. *See Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987); *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1151 (11th Cir. 1985). To compare one circuit's determination on abandonment where the owner does not appear and assert a claim of ownership with another circuit's determination where an owner has appeared and established ownership is duplicitous. The majority opinion in *Columbus America*, 974 F.2d at 462, discusses and distinguishes these cases. (Pet. App. 54a-55a).

Every case that has considered the issue of abandonment in the context of an underwriter's claim of ownership by subrogation to sunken treasure or cargo has upheld the underwriter's right and has reiterated that once underwriters establish ownership abandonment can only be found by clear and convincing evidence. *See, e.g., Fairport, supra.*; *Illinois v. Zych*, 186 Ill. 2d 267 (1999).

This Court in the *Brother Jonathan* decision settled the issue. It is significant that at the time of reaching a decision in *Brother Jonathan* this Court had an amicus curiae brief filed in that proceeding by CADG.[12] In its brief CADG

12. In fact, CADG filed amicus curiae briefs in the *Brother Jonathan*, *Fairport*, *Yukon Recovery* and *Zych* cases. In each brief the holding of the Fourth Circuit in *Columbus America*, 974 F.2d (Cont'd)

requested that this Court adopt a definition of abandonment which would, if applied retroactively to the instant case, divest the Underwriters of title. CADG sought to have this Court adopt a new definition that will conclusively infer abandonment after the passage of a fixed period of time. In rejecting the invitation to adopt such a definition, this Court stated that abandonment is to be determined in accordance with the traditional rules of admiralty. 523 U.S. at 508. It was the traditional rules of admiralty that were followed by the Fourth Circuit in its 1992 decision and by the Sixth, Ninth and Fourth Circuit Courts of Appeal in the above-referenced cases.

Because there is no authority to support CADG's position of a conflict in the circuits, CADG can only cite cases in which no owner or underwriter appeared to assert ownership rights to the *res* in an effort to support the contention of a conflict. CADG's attempt to create a conflict does not deserve consideration by this Court.

(Cont'd)
450, was misrepresented which accounts for the confusion in some of the decisions. *See Zych*, 186 Ill. 2d at 270, 281-282, where the court comments on CADG's amicus brief. No court has adopted CADG's position.

IV.

THE ABANDONED SHIPWRECK ACT, THE DEVELOPMENT OF ADMIRALTY LAW AND THE EMERGING NEW FIELD OF HIGH TECHNOLOGY IN MARITIME EXPLORATION ARE ONLY ENDANGERED BY THE INCONSISTENT SELF-SERVING POSITIONS ADVOCATED BY PETITIONER

CADG is arguing inconsistent positions in its brief. First, it alleges that unless there is some change in the traditional admiralty rule of abandonment the Abandoned Shipwreck Act, 43 U.S.C. § 2101, *et. seq.*, will be emasculated. It charges that salvors and insurance companies that insure lost cargoes, will join hands to salvage the lost vessels and their cargo. Because only abandoned shipwrecks become the property of the State under the Act, this will deprive the state of ownership. It then argues that unless the traditional rule is changed high technology maritime exploration will not occur.

These are completely inconsistent positions. First, if property is held to be abandoned there can be no exploration of any sort, because the State will own the property. It is only in those instances where the property is not abandoned that high technology exploration can occur. Secondly, Congress, when it enacted the Abandoned Shipwreck Act, deliberately gave the states title only to property which had been abandoned. Although Congress could have established a set period of time to invoke the principle of abandonment, it chose to rely on the traditional rules of admiralty to determine when property is deemed abandoned.

CADG reveals that it is solely interested in the benefits it may receive in this case. It seeks only to have this Court reverse the judgment of the Fourth Circuit that has been standing for eight years. If this Court should adopt the rule advocated by CADG, it will foreclose the salvage efforts of any abandoned property that may be subject to the Abandoned Shipwreck Act.

CONCLUSION

This is a case between private litigants that has been settled. Pursuant to the Settlement Agreement, all claims and issues were dismissed with prejudice, and the Petitioner has reaffirmed the settlement by selling the portion of the treasure to which it received title by virtue of the Settlement Agreement. By accepting the benefits of the Settlement Agreement confirming that all disputes between the parties were dismissed, including any claim of abandonment, and by selling its share of the treasure, Petitioner has negated or forfeited its right to appeal.

Moreover, Petitioner's attempt to have this Court review the abandonment test used by the Fourth Circuit in its 1992 opinion is violative of the law of the case doctrine, especially considering that the Supreme Court denied *certiorari* on that exact issue seven years ago. Further, there is no conflict between the circuits for the Supreme Court to resolve. All circuits that have considered the issue, in the context of a long lost wreck where a claim of ownership is made and established, have held that while an abandonment may be inferred, the length of time is not conclusive and the party claiming an abandonment must do so by clear and convincing evidence.

The Petitioner has attempted to create a conflict between the circuits by comparing factually inapposite cases where no owner or underwriter appeared in the action to assert a claim of ownership, to cases where owners have appeared and established ownership. Since these cases do not represent a conflict and there is no support for the Petition for a Writ of Certiorari, the Petition should be denied with an award of costs, expenses and attorneys' fees to the Respondents.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED, ENTERED AND FILED JUNE 23, 1998

UNSEALED 6-29-98

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Civil Action No. 87-363-N

Columbus-America Discovery Group, Inc.

Plaintiff,

vs.

The Unidentified, Wrecked and Abandoned Sailing Vessel, etc., *in rem*, *et al.*,

Defendants.

ORDER

On the representation of the parties by their counsel that the parties have completed the division of the *res* as set forth in the Settlement Agreement signed on their behalf on May 19, 1998, all claims, matters and issues raised in this case including interest, attorneys' fees, costs and custodial expenses have been resolved to the satisfaction of the parties and all court costs have been paid; it is,

ORDERED that:

1. This case is "DISMISSED AGREED" including all claims, matters, issues, interest, attorneys' fees, costs and

custodial expenses incurred by the parties being DISMISSED WITH PREJUDICE.

2. Pursuant to the Settlement Agreement entered into by the parties, title to the items selected by the individual parties that make up their respective interest in the *res* salvaged from the S.S. CENTRAL AMERICA is hereby transferred and delivered to them free and clear of all liens and encumbrances.

3. The Court retains jurisdiction to enforce the settlement of the parties and the prior Orders in this case.

ENTER: 6/23/98

s/ J. Calvitt Clarke, Jr.
U.S. District Judge

Dated:

We ask for the entry of this Order:

COLUMBUS-AMERICA DISCOVERY GROUP, INC.

By s/ Glen A. Huff
Of Counsel

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL.
UNDERWRITERS

By s/ Guilford D. Ware
Of Counsel

APPENDIX B — LETTER FROM DWIGHT MANLEY, MANAGER, CGMG TO GEORGE DALY, BIGHAM, ENGLAR, JONES & HOUSTON DATED JANUARY 31, 2000

CGMG
24 Corporate Plaza, Suite 100
Newport Beach, CA 92660
Tel: (949) 719-1966
Fax: (949) 719-1969

January 31, 2000

George Daly
Bigham Englar Jones & Houston
40 Wall Street
New York, NY 10005-2301

Dear Mr. Daly:

Thank you for taking my call today to discuss my groups purchase of The SS Central America Treasure.

As I told you, we purchased the treasure from C.A.D.G. December 8, 1999. We have subsequently taken possession and sold the gold.

We would be happy to discuss the disposition of the remaining 7% of the gold when it is resolved. Until then, we are going to continue marketing and selling our gold.

Please refrain from contacting our marketing companies, as your letter that you already sent has caused confusion and delay that can be very costly and damaging.

Appendix B

As I told you on the phone, I am sympathetic to your plight. But my group has spent many tens of millions of dollars to purchase free and clear title to the gold, and develop an extensive marketing plan. Any interference with it could result in a correspondingly large loss in revenue.

This letter is being sent to our retailers to reaffirm their right to sell our gold.

Sincerely,

s/ Dwight Manley
Dwight Manley
Manager

cc Don Doyle
David Hall
Q. David Bowers
John Albanese
Rich Howell
Rick Robol

APPENDIX C — LETTER FROM RICHARD K. HOWELL, RUTAN & TUCKER, LLP TO GEORGE DALY, BIGHAM, ENGLAR, JONES & HOUSTON DATED FEBRUARY 1, 2000

RUTAN & TUCKER LLP
ATTORNEYS AT LAW

* * *

February 1, 2000

VIA FACSIMILE AND FIRST CLASS MAIL

George Daly
Bigham, Englar, Jones & Houston
40 Wall Street
New York, NY 10005-2031

Re: *California Gold Marketing Group, LLC*

Dear Mr. Daly:

As I informed you yesterday, we are the attorneys for the California Gold Marketing Group. This letter will confirm our conversation in which you acknowledged that the Fourth Circuit Court of Appeals January 29 Order — as presently issued — does not restrain any person or entity other than Columbus-American Discovery Group from selling the treasure at issue. To the extent that you intend to take a contrary position on this matter, please notify me, in writing, immediately.

Similarly, in the event you intend to seek a court order that could potentially restrain my client or its retailers from

disposing of the treasure, I request that you notify me prior to taking such action so that my client will have the opportunity to address these issues.

Finally, as owners of approximately 92.5% of the overall treasure, my client is willing to consider any reasonable proposals you may have to bring this matter to resolution — including using any leverage we may have with Columbus-American Discovery Group. In view of the numerous representations and warranties made by Columbus America in the underlying Asset Purchase Agreement confirming, among other things, there were no court actions, orders or claims which interfered with Columbus' ability convey clear title to the treasure purchased by my client, we are gravely disturbed by the events of the past few days. Regardless, we are also concerned with the communications coming from you and your clients to our retailers and in the press and insist that all of you refrain from any further activities which will interfere with our ongoing efforts to market the treasure.

Please feel free to contact me with any questions or concerns you may have.

Very truly yours,

RUTAN & TUCKER, LLP

s/ Richard K. Howell
Richard K. Howell

RKH:jsa
cc: Dwight Manley

(3)

No. 99-1935

Supreme Court, U.S.
FILED
JUN 30 2000
CLERK

In The

Supreme Court of the United States

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF VIRGINIA, ALABAMA, GEORGIA, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NORTH CAROLINA, THE NORTHERN MARIANA ISLANDS, OREGON, SOUTH CAROLINA, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

The *Amici* are coastal States and island jurisdictions of the United States (collectively, "the *Amici* States").[1] As such, they exercise sovereignty over submerged lands lying adjacent to their shores.[2] Embedded in those submerged lands are the wrecks of thousands of ships, lost over the centuries.[3] By act of Congress, shipwrecks "abandoned" by their original owners now belong to the coastal States and island jurisdictions ("the States") in whose submerged lands they lie embedded. Abandoned Shipwreck Act ("ASA"), 43 U.S.C. §§ 2101 *et seq.*[4] Some of

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[1] One exception is West Virginia, which joins all of her sister States of the Fourth Circuit and which has analogous interests as a riparian State bordering the Ohio River.

[2] By virtue of the 1953 Submerged Lands Act, States bordering the Atlantic Ocean or Pacific Ocean may exercise sovereignty over lands lying beneath the ocean for a distance of three miles from their shores. States bordering the Gulf of Mexico may exercise like sovereignty into the Gulf for a distance of up to three marine leagues. Great Lake States may exercise such sovereignty to the boundary with Canada. 43 U.S.C. §§ 1301, 1312.

[3] Congress has estimated that 50,000 abandoned shipwrecks are located in State waters, with "5-10 percent" having historical significance. *See Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 100th Cong., 2d Sess. 1, (1988), *reprinted in* 1988 U.S.C.C.A.N. at 365, 370. *See also* Bruce D. Berman, Encyclopedia of American Shipwrecks, iii (1972) (referring to "more than 50,000 documented shipwrecks in American territorial waters," including approximately 13,000 with a gross tonnage of 50 tons or more).

[4] The *Amici* States likewise acquired title to abandoned shipwrecks embedded in their protected coralline formations, or lying on their submerged lands and included in (or eligible for inclusion in) the National Register of Historic Places. 43 U.S.C. § 2105.

the ships are believed to have been carrying gold or other precious cargo. Others may hold artifacts of important historical value.

Included among these shipwrecks are vessels as old as the *Tiger*, a British ship sunk along the Outer Banks of North Carolina in 1585,[5] and as tragic as the *Juno*, a 34-gun Spanish frigate that foundered in 1802 with the loss of 432 sailors, soldiers and civilians[6] and believed by some to have been carrying a large shipment of precious metals.[7] They include the *Queen Anne's Revenge*, flagship of the notorious pirate, Blackbeard, recently discovered in North Carolina waters;[8] the schooner *Billy Bowlegs*, a privateer lost in 1840 at the entrance to Apalachicola Bay, Florida and valued at the time at over $4 million;[9] the *Phoenix*, a three-masted, three-decked Russian frigate, the first ship built in Russian America, that sank in Alaskan waters in 1799 with the loss of the Archimandrite of the Kodiak Mission;[10] and the H.M.S. *Nancy*, a Detroit-built

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[5] Bruce D. Berman, Encyclopedia of American Shipwrecks, 147 (1972).

[6] *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 681 (E.D. Va. 1999).

[7] Maria Puente, *1802 Shipwreck In The Eye Of A Modern Legal Storm*, USA Today, May 7, 1998, at 9A.

[8] Faye Mitchell Henderson, *A Blackbeard Valentine's Tale* (last modified Feb. 12, 1999)<http://web.dcr.state.nc.us/recentblackbeard.htm>.

[9] Bruce D. Berman, Encyclopedia of American Shipwrecks, 109 (1972).

[10] Mark Burwell, *Shipwrecks Off Alaska's Coast* (last modified Feb. 17, 2000) <http://www.mms.gov/alaska/ref/ships/tables/opqr.htm>.

British warship burned and sunk by U.S. warships in Lake Huron during the War of 1812.[11]

For vessels such as these – and the thousands of other shipwrecks in coastal waters – State ownership means protection and responsible management. As the owners of shipwrecks, States are able to restrict recovery operations to those who are qualified and licensed. They are able to impose protocols that meet the exacting demands of serious underwater archeology.[12] And they are in a position to ensure that the cultural riches – and other treasures – recovered from the sea are shared with the public.

In order to have these benefits, the States must have title. But, in order for States to obtain title under the ASA, the shipwreck must be abandoned. Yet, "abandonment" is not a term with a statutory definition and there is disagreement among the circuits about what must happen in order for abandonment to occur. As discussed below, one circuit appears to recognize only *express* abandonment. Another says that abandonment may be *implied*. Still another says that implied abandonment will suffice, but has raised the bar by adding the requirement that abandonment be proved by clear and convincing evidence. These widely varying standards cause unequal

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[11] David Swayze, *The Great Lakes Shipwreck File: Total Losses of Great Lakes Ships 1679-1998* (last modified Feb. 2000) <http://www.oakland.edu/boatnerd/swayze/shipwreck/>.

[12] *See, e.g.*, Va. Code § 28.2-1204 (1997); Va. Code § 10.1-2214 (1998) ("All recovery operations . . . shall be carried out . . . in such a manner that the maximum amount of historical, scientific, archaeological and educational information may be recovered and preserved in addition to the physical recovery of items.").

treatment among the *Amici* States, and deprive some of them of rights that Congress intended to bestow on all.

These two problems – unequal treatment of the States and frustration of Congressional purpose – should be enough to merit this Court's review of the abandonment issue. But there is more. Technological developments are making possible the location and recovery of shipwrecks once thought forever lost. It may not be long before our coastal waters teem with expeditions to recover the thousands of sunken vessels and cargoes that have accumulated over time. If chaos in admiralty is to be avoided, the ownership rights of the States must be clearly established. Given the conflict among the circuits, the issue cannot be settled until this Court speaks and declares a nationwide standard for what is meant by "abandonment."

There are now two cases available to this Court to clarify the standard for abandonment. This case is one. The other is *Yukon Recovery, L.L.C. v. Certain Abandoned Property,* 205 F.3d 1189 (9th Cir. 2000), *petition for cert. filed,* 68 U.S.L.W. 3774 (U.S. June 20, 2000) (No. 99-1958) (involving the steamer S.S. *Islander* and her reported shipment of gold sunk in the coastal waters of Alaska in 1901). The *Amici* urge the Court to grant certiorari in both.

REASONS FOR GRANTING THE WRIT

Summary

The circuits are in conflict on what is required to establish abandonment of a shipwreck. Must abandonment be express, or may it be implied? Must the proof be clear and convincing, or does a preponderance of the evidence suffice? Admiralty law should give the same

answers nationwide, but now it does not. Regional answers are especially troublesome when, as here, they create disparities among the rights of States. Certiorari should be granted to resolve this conflict.

Having the same answer nationwide does not necessarily mean using the same standard in coastal waters under the ASA, as in the high seas where the ASA does not apply. Whether there is to be one standard or two is an important federal question that should be, but has not been, addressed by the Court. In any event, the purposes and expectations of the ASA can only be met if the standard for coastal waters is implied abandonment, with a presumption of abandonment arising from passage of a long period of time.

Some courts have viewed the absence of technology to salvage a ship as an argument against abandonment. But it makes more sense to view such powerlessness as an argument *for* abandonment. Since many of the wrecks that are likely to be in dispute sank long before technology became available to recover them, the significance of technological incapacity is also an important federal question that should be addressed by this Court.

THE CIRCUIT CONFLICT IN A NUTSHELL

This Court has repeatedly recognized the importance and fundamental need for "harmony" and "uniformity" of admiralty law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (a "fundamental purpose" of the Constitution is to "preserve adequate harmony and appropriate uniform rules relating to maritime matters . . . "); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *The Lottawanna*, 88

U.S. 558 (1875). Despite the need for harmony and uniformity, the circuits are divided on whether the abandonment of shipwrecks must be express, or whether it may be implied. They also differ as to the standard of proof and the effect of a long passage of time. Their conflicting positions may be summarized as follows:

First Circuit: Presumption of abandonment based on passage of time – *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked & Abandoned Steam Vessel,* 833 F.2d 1059 (1st Cir. 1987);[13] *see also Commonwealth v. Maritime Underwater Surveys, Inc.,* 403 Mass. 501, 531 N.E.2d 549 (1988).[14]

Second Circuit: Clear and convincing evidence of express abandonment – *Dluhos v. The Floating & Abandoned Vessel Known as the New York,* 162 F.3d 63 (2d Cir. 1998).[15]

Third Circuit: No reported circuit decision. District courts have used different standards: (i) presumption of

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[13] Law of finds (based on abandonment) appropriate where "(1) articles have been presumptively abandoned, *i.e.,* either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered . . . ." 833 F.2d at 1065. The *Republic* sank in 1909, seventy-six years before the First Circuit ruled.

[14] "We conclude that, since the *Whydah* has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned and accordingly apply the law of finds." 531 N.E.2d at 552.

[15] Concerning a claim for ownership of a ship in the Erie Canal, and commenting on the preference for the law of salvage over the law of finds, the Second Circuit stated "the *New York* has neither been expressly and explicitly abandoned by its owners, nor has it rested for centuries under fathoms of open ocean." 162 F.3d at 74 [footnote omitted].

abandonment based on passage of time – *Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D. Del. Feb. 4, 1992), *aff'd without op.*, 26 F.3d 123 (3d Cir. 1994);[16] (ii) consideration of all the circumstances – *Moyer v. The Wrecked and Abandoned Vessel, Known as The Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993).[17]

Fourth Circuit: Clear and convincing evidence of express abandonment – *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), *subsequent appeal, remanded on other grounds*, 203 F.3d 291 (4th Cir. 2000).[18]

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[16] *Sub-Sal* was decided prior to enactment of the ASA, and concerned a British warship. "Since the *DeBraak* was abandoned in 1798 and its location off the coast of Delaware remained unknown until 1984, this Court concludes that the law of finds applies." 1992 U.S. Dist. LEXIS 2461, at *8.

[17] *Moyer* found an implied renunciation of ownership in the face of numerous independent, open and notorious salvage operations. "Abandonment may be inferred from circumstantial evidence. Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon." 836 F. Supp. at 1105 (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). "Other factors include the place of the shipwreck as well as the actions and conduct of the parties having ownership rights in the vessel." 836 F. Supp. at 1105 (citing *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1335 (E.D. Va. 1990), *rev'd in part and remanded*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)).

[18] "[A]bandonment must be proved by clear and convincing evidence . . . such as an owner's express declaration abandoning title." 974 F.2d at 466. *But see Baltimore, Crisfield & Onancock Line v. United States*, 140 F.2d 230 (4th Cir. 1944) and *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951), where the Fourth Circuit used an implied abandonment standard.

This is the most stringent standard used by any circuit. As a result, all five states comprising the Fourth Circuit join in support of the petition for certiorari.

Fifth Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).[19]

Sixth Circuit: Clear and convincing evidence and implied abandonment – *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999).[20]

Ninth Circuit: Implied abandonment, but a demanding evidentiary standard (insurer's failure to react to earlier salvage efforts and failure to participate in claims proceedings are insufficient to imply abandonment) – *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000);[21] consideration of all the circumstances, with implied abandonment from passage of time or failure to salvage – *Deep Sea Research, Inc. v. The Brother*

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[19] "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." 569 F.2d at 337.

[20] "We agree that lapse of time, alone, does not necessarily establish abandonment, . . . and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, . . . may support a finding that an owner has abandoned a shipwreck." 177 F.3d at 499-500.

[21] Apparently the District Court in *Yukon Recovery* used the preponderance of the evidence standard, which the Ninth Circuit refused to address. 205 F.3d at 1193-94. The Ninth Circuit also agreed that the competing salvor was entitled to salvage the wreck based in part on its salvage contract with the gold insurer. *Id.* at 1197. Alaska's participation in this Amicus brief is precluded by the terms of its settlement in *Yukon Recovery*. Issues between the other parties remain.

Jonathan, 89 F.3d 680 (9th Cir. 1996), *aff'd in part and vacated in part on other grounds and remanded sub nom., California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).[22]

Eleventh Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985).[23]

As the above list shows, the circuit courts use different tests, even as they have acknowledged frustration at the lack of uniformity.[24] This divergence is particularly

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[22] "Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced, or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." 89 F.3d at 688.

[23] The Eleventh Circuit adopted the reasoning of the Fifth Circuit in *Treasure Salvors, Inc.*, 569 F.2d 330. *See supra* at n.19.

[24] As the Fourth Circuit noted, "[W]e agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal. . . . A comparison of our earlier decision in this case . . . with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in [the Fourth Circuit] than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question. . . . " *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303-04 (4th Cir. 2000). *See also Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084-85 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680, 688 (9th Cir. 1996).

As the Ninth Circuit observed, "The ASA creates uncertainty when a salvor cannot determine in advance

disturbing since the rights of sovereign States are directly implicated by the standard used. It is a divergence that can only be corrected by this Court's exercise of its constitutional role to maintain uniform admiralty laws. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959). The petitions should be granted.

AN IMPORTANT FEDERAL QUESTION:

ARE SHIPWRECKS IN COASTAL WATERS UNDER THE SAME ABANDONMENT STANDARD AS SHIPWRECKS IN THE HIGH SEAS?

An unresolved issue in admiralty law is whether all shipwrecks are subject to the same standard of abandonment regardless of where they are found. Are shipwrecks beneath coastal waters – where the ASA applies – subject to the same standard as shipwrecks beneath the high seas?[25] The two shipwreck cases on which certiorari is now being sought – *Columbus-America* and *Yukon Recovery* – provide this Court with an opportunity to resolve this important issue of federal law.

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whether a wreck is 'abandoned' or 'embedded' and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate, survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage. Both of the parties to this litigation have expended significant resources to locate the *Islander* but prudently avoided costly salvage operations which could have resulted in a total loss under the ASA." *Yukon Recovery*, 205 F.3d at 1196.

[25] For purposes of this Brief, the term "high seas" shall mean waters and submerged lands sufficiently distant from the shore as not to be covered by the ASA.

The possibility that different standards might apply to different locations is implicit in the rationale used by the Fourth Circuit in deciding *Columbus-America*. The shipwreck in this case was found 160 miles from shore, well beyond the reach of the ASA. In determining what law to apply to the case, the Fourth Circuit was faced with two options – finds law and salvage law – with the choice between them depending on whether or not the vessel was abandoned. If the vessel *was* abandoned, then no one had title to it and the law of finds applied. If it was *not* abandoned, title remained with the original owner and the law of salvage applied. Before deciding what abandonment standard to use, the Fourth Circuit expressed a policy of favoring salvage law over finds law. The Court said:

> In sharp contrast to "the harsh, primitive, and inflexible nature of the laws of finds" is the law of salvage. *Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.*

Columbus-America, 974 F.2d at 460 (emphasis added).

The Fourth Circuit then set the abandonment standard high in order to give a broad sweep to the favored law of salvage and a narrow sweep to the disfavored law of finds.

The *Columbus-America* Rationale Makes No Sense In Coastal Waters.

A major problem with the rationale used in *Columbus-America* is that it makes no sense to apply it to shipwrecks in coastal waters governed by the ASA. There

the choice of law is different. In coastal waters, there is no law of finds. Instead, there is the law of salvage and the law of State ownership, with the choice between them again depending on whether or not the vessel was abandoned. If the vessel was *not* abandoned, title to it remains with the original owner and the law of salvage applies. If it *was* abandoned, title is vested in the State under the ASA. Since title must be vested in either the original owner or the State, the precondition on which the law of finds is based – *i.e.*, that no one has title – never arises. *Dluhos*, 162 F.3d at 74, n.10; *Wiggins*, 186 F. Supp. at 456. *See also* 43 U.S.C. § 2106 ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 6 of [the ASA] [43 U.S.C. § 2105] applies.").[26] Thus, in coastal waters, the rationale that animated the Fourth Circuit – a preference for the law of salvage over the law of finds – is irrelevant. "Where the reason of the rule ceases, the rule also ceases." *Funk v. United States*,

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[26] There is one hypothetical exception to the proposition that the law of finds has no application in areas governed by the ASA. Under that statute, in order for a State to become the owner, the shipwreck must be both "abandoned" and "embedded" in the State's submerged lands. Theoretically, a shipwreck could be abandoned but not yet embedded. In such a case, the law of finds would apply to the abandoned wreck until it became embedded. As a practical matter, however, it is not likely that any ship of any value would be so readily abandoned, especially since "embeddedness" is a criterion that is met soon after the ship sinks to the bottom. "For purposes of this Act . . . the term 'embedded' means firmly affixed in the submerged lands or in corralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, *and any part thereof*." 43 U.S.C. § 2102 (emphasis added).

290 U.S. 371, 385 (1933); *United States v. Chambers*, 291 U.S. 217, 226 (1934).

Whether There Is One Standard Or Two, Implied Abandonment Should Be The Rule For Shipwrecks In Coastal Waters.

If the policy-driven methodology used in *Columbus-America* is transported from the high seas into coastal waters, the different choice of law leads to an abandonment standard directly opposite to the one reached by the Fourth Circuit.[27] If finds law is disfavored compared to salvage law, then salvage law must likewise be disfavored compared to State ownership under the ASA. This preference for State ownership must be recognized for at least three reasons: First, to paraphrase *Columbus-America*, State ownership's "aims, assumptions and rules are more consonant with the needs of marine activity [than salvage law] and . . . [State ownership] encourages less competitive and secretive forms of conduct than [salvage law]." *See* 974 F.2d at 460. Second, State ownership is the result of congressional deliberation and enactment of the ASA, and thus represents a conscious policy choice made by the legislative branch. If Congress thought that salvage law was good enough for coastal waters, it would have said so. Third, State ownership is better designed than the law of salvage to protect the public interest in

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[27] This is not to say, however, that the Fourth Circuit will necessarily agree with this argument. Indeed, at least one district court in the Fourth Circuit views *Columbus-America* as requiring an express abandonment standard even for shipwrecks in coastal waters. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999) (applying express abandonment standard to Spanish ships sunk in 1750 and 1802), *appeal docketed*, No. 99-2036 (4th Cir. July 30, 1999).

the historic value – and potential financial value – of shipwrecks in coastal waters.

In *Columbus-America*, the Fourth Circuit set the abandonment standard high in order to give broad sweep to salvage law, which it favored in the high seas context of that case. By analogy, then, when the shipwreck is in coastal waters, the abandonment standard must be set low in order to give broad sweep to State ownership, which is the favored law in that context. This means using a standard of implied abandonment for shipwrecks in coastal waters.

Since the policy-driven methodology used in *Columbus-America* logically leads to different standards in different contexts, the next question is whether that lack of uniformity is appropriate. And, assuming *arguendo* that there should be a single standard for both contexts, how should that standard be determined? One approach would be to continue the focus on policy considerations, but to ask which context – high seas or coastal waters – should drive the definition of that single standard. Is it more important to have (i) a broad application of State ownership in coastal waters, or (ii) a broad application of salvage law in high seas?

The *Amici* States contend that a broad application of State ownership is more important. This is so for at least three reasons. First, shipwrecks are more concentrated in coastal waters and are more likely to be recovered than shipwrecks in the high seas. Thus, the rule best suited for coastal waters should govern. Second, the public interest in shipwrecks located in coastal waters should outweigh the purely private interests of parties battling over shipwrecks in the high seas. Third, the legislative history of the ASA, on which State ownership is based, shows that

Congress understood the rule to be abandonment by implication.

> [T]he term abandoned does not require the original owner to actively disclaim title or ownership. *The abandonment or relinquishment of ownership may be implied or otherwise inferred,* as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 1, (1988) at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366 (emphasis added). The standard should be designed to accomplish – rather than frustrate – these Congressional expectations and give broad sweep to its enactment. Again, this means abandonment by implication.

Another approach to defining a single standard would be to disregard the competing policy considerations and to look to other principles instead. But to disregard those policy considerations is to remove the very foundation on which the Fourth Circuit built its stringent standard in *Columbus-America.* What is left is the competing rationale used by Judge Widener in his *Columbus-America* dissent – and by courts in conflict with the Fourth Circuit – in recognizing a more generous abandonment standard. That standard includes recognition of abandonment implied by the long passage of time. "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Columbus-America,* 974 F.2d 450, 477 (Widener, J., dissenting), *quoting Treasure Salvors, Inc.,* 569 F.2d at 337 (Spanish galleon sunk in 1622); *also citing Martha's Vineyard,* 833 F.2d at 1065 (ocean liner sunk in 1909); *Klein,* 758 F.2d at 1514 (English ship sunk in eighteenth century).

In short, if there is to be a *single* standard for the high seas and coastal waters, then it must be implied abandonment, not express abandonment. On the other hand, if there are to be *separate* standards for coastal waters and the high seas, then the standard for coastal waters still must be implied abandonment. The *Amici* States urge the Court to grant certiorari in *Columbus-America* and *Yukon Recovery* in order to make it clear that whether there is to be one standard or two, the only standard applying to coastal waters is implied abandonment.

ANOTHER IMPORTANT FEDERAL QUESTION: DOES THE ABSENCE OF SALVAGE TECHNOLOGY ARGUE *AGAINST* ABANDONMENT, OR *FOR* IT?

The decisions in *Columbus-America* and *Yukon Recovery* are based in part on the view that technological inability to find or salvage a shipwreck argues *against* abandonment. *Columbus-America*, 974 F.2d at 463 (insurance carrier "not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success") (citation omitted); *Yukon Recovery*, 205 F.3d at 1194 (failure to use "primitive, although ingenious, technology" that previously proved unsuccessful does not constitute abandonment). But, this has gotten things backwards, at least insofar as older shipwrecks are concerned. If the generation in which a vessel sank had no means to find or salvage it, a court should infer, in the absence of other evidence, that the owners of that vessel,

having no hope of remedying their loss, simply abandoned it.[28]

The *Columbus-America* decision implicitly attributes to generations past a faith in technological progress that is a phenomenon of the late 20th century. When confronted by a problem that current technology cannot solve, society today tends to believe it is only a matter of time before a solution will be found. It is an attitude that springs from witnessing the marvels of space travel, heart transplants, nuclear energy, computers, the Internet and all the other increases in technology over the past one or two generations. But for most of human history, the pace of progress has been very slow. The wooden ships that sailed the ocean two hundred years ago still had no means of power other than the wind, no means to light their craft other than oil lamps, and had been equipped only recently with a reliable means of finding their longitude at sea.[29] By the time the *Central America* sank in 1857, steam power had been introduced as a supplemental source of power, often linked to paddlewheels. But ships were still made of wood and they were all designed to float on top of the sea, not sail beneath it. Electric power was still a generation or more away. Plumbing the bottom of the ocean was no more possible for man than flying to the moon.

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[28] *See generally, Eads v. Brazelton*, 22 Ark. 499 (1861) (rejecting claim by attempted salvor whose inability to recover shipment of lead was the result of the lack of steam power and other technology used by later, successful salvor).

[29] The means to accurately calculate one's longitude did not become available until the 1780's. *See* Dava Sobel and William J.H. Andrewes, The Illustrated Longitude (1998).

Nearly a century and a half later, those who found the wreck of the *Central America* and recovered her cargo were able to do so only by the use of science that not even Jules Vernes predicted: computer-guided, satellite-based, geo-positioning technology and robotic submarines, outfitted with video cameras, that could withstand the crushing pressures and extreme cold a mile and a half below the surface. To suggest that the owners of long lost shipwrecks not only foresaw the ability to recover them – but based their decisions on such prophecies – is fantasy. If the technology of the era did not permit recovery of a sunken vessel, the owners did not decide to wait a century or two until all these things could be invented. They did what any reasonable person of the era would have done: they abandoned it.[30] This Court should grant the petitions for the additional purpose of making clear that the absence of contemporaneous technology to recover an older wreck tends to *prove* abandonment, not disprove it.

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[30] "They [the insurance companies] had no hope or idea they could locate the *Central America*, and even if they located it, they had no hope they could recover anything from it. . . . Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the *Central America*." *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1345 (E.D. Va. 1990).

CONCLUSION

A conflict among the circuits on an important legal issue can always be problematic, but it is especially troublesome when it occurs in admiralty law, where uniformity has always been greatly valued. It is even more urgent when the conflict causes some States of the Union to be denied important benefits that other States are granted. Such a troublesome and urgent conflict has arisen on the issue of abandonment. It should be resolved as soon as possible, and resolved in a manner that gives all States the full benefit of the implied abandonment standard contemplated by Congress when it passed the Abandoned Shipwreck Act. The *Columbus-America* case – especially in tandem with *Yukon Recovery* – presents this Court with an opportunity to address the issue and settle the matter. The petitions for writs of certiorari should be granted.

June 30, 2000

Respectfully submitted,

Commonwealth of Virginia, State of Alabama, State of Georgia, State of Illinois, State of Louisiana, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Mississippi, State of North Carolina, Commonwealth of the Northern Mariana Islands, State of Oregon, State of South Carolina, State of Washington, and State of West Virginia

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No.99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF ACADEMIES OF SCIENCE

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The National Association of the Academies of Science hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Although counsel for petitioner has consented to the filing of this brief, counsel for respondents was contacted and refused to consent to the filing of this brief.

The National Association of Academies of Science is comprised of 45 member academies and is devoted to promoting scientific inquiry, advancing education and fostering practical and theoretical progress in science. The Association believes that the preservation of incentives to engage in scientific inquiry is a matter of great significance to us all. For instance, attempts to improve our quality of life have led scientists into previously unexplored areas, leading to breakthroughs in many fields, from medicine to bio-science and improved technologies. The earth's seas provide a virtually limitless frontier for advancing numerous fields of scientific study.

While the possibilities for scientific information from new discoveries in the deep seas are virtually limitless, and the practical benefits many, the ability and opportunity to conduct the costly and time-consuming research necessary for such endeavors is greatly diminished when scientists and engineers are subject to protracted and expensive litigation over stale claims. The location and conservation of submerged and maritime historical cultural resources depends on costly specialized technologies. The ability of explorers to obtain financial backing, either through private venture capital or commercial loans, will depend on their ability to determine the legal standard and management regime applicable to their discoveries. In undermining such predictability, the practical effect of the conflict among the circuits over whether admiralty

courts may infer abandonment of long-lost shipwrecks will be to impede opportunities presented for scientific research in the deep seas. The immediate effect of the court of appeals' decisions below is to undermine certainty and predictability in the quest for innovative exploration. When a discovery team of scientific researchers, supported by private financial investment, can no longer be assured of the legal standard for abandonment that will be used to determine their rights in the material they recover, continued advanced deep ocean exploration will suffer. Fewer and less sophisticated explorations will undoubtedly mean fewer and less significant discoveries.

The existing conflict among the circuits over the admiralty law standard for abandonment threatens not only deep sea exploration, but space exploration as well. Because the untamed frontiers of both deep ocean and outer space pose many of the same challenges to any human presence, legal practices and rules affecting human presence in the ocean will likely influence those in outer space.

If a responsible group, such as Columbus-America Discovery Group, is to be tied up in legal proceedings for a decade or more because of confusion over the admiralty law standard for abandonment—and is thereby prevented from carrying its work to completion—no scientists, explorers, archaeologists, or entrepreneurs will risk undertaking such enormously expensive projects; and they certainly will have little ability to promote the kind of scientific and educational programs that might be otherwise available. If the court of appeals' decisions below stand, it will aid only those groups that sit on the sidelines and wait for a judicially-created windfall from the hard work and ingenuity of others.

Exploration and scientific discoveries will almost certainly decline and all mankind will suffer.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

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July 1, 2000

QUESTION PRESENTED

Should the Court resolve the conflict among the circuits concerning the admiralty law test for the abandonment?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ACADEMIES OF SCIENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The National Association of Academies of Science is comprised of 45 member academies and is devoted to promoting scientific inquiry, advancing education and fostering practical and theoretical progress in science. It encourages all scientific disciplines, in all parts of our

nation.[1] The National Association is especially active in stimulating young people interested in science, and works closely with high school and collegiate academies of science to promote interest in science and to encourage scientific research. Because it believes that the law should promote science by fostering the fundamental national tradition, that vision, hard work and ingenuity pay off—and because the conflict among the circuits over the admiralty law standard for abandonment, embodied in the decisions below, presents precisely the opposite message to the young people of our nation—the National Association of Academies of Science respectfully believes this matter warrants the Court's attention.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. THE ISSUE OF THE ADMIRALTY LAW STANDARD FOR ABANDONMENT IS IMPORTANT TO SCIENTISTS, EDUCATORS AND YOUNG PEOPLE THROUGHOUT THE NATION

The Fourth Circuit's adherence to the express abandonment theory has sent shock waves throughout the scientific community. It has baffled not only oceanographers, explorers, and discoverers, but also individuals and institutions representing a broad range of scientific,

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[1] Pursuant to Rule 37.6, the National Association of Academies of Science notes that counsel for Petitioner assisted in the drafting of a portion of this Brief by providing an update on the status of the proceedings, docketing information and a service list, and that Petitioner has assisted in the service and copying of this Brief.

pharmacological, technological, and biological interests. The court of appeals' standard, in practical effect, that admiralty courts may not apply common sense to consider the circumstantial evidence and infer abandonment, and instead that an express abandonment must be proved by clear and convincing evidence, is in conflict with the admiralty law standard for abandonment applied in the First, Fifth, Sixth, Ninth Circuits and Eleventh Circuits (which, themselves, are in conflict regarding the standard). More fundamentally, the notion that a loose consortium of insurance companies, which never stepped forward to assist in exploration or recovery efforts in any way, can appear in court at the last minute and successfully strip a team of engineers, scientists and explorers of the fruit of many years of vision, initiative, risk, and hard work shocks the national conscience. The circuit conflict, which has produced this unjust result, reflects an ever-widening gap among the courts which the Court should now resolve.

A. The Conflict Among the Circuits on the Admiralty Standard for Abandonment Has a Stifling Effect on Nascent Scientific Endeavors To Develop New Medicines, Advance Bio-Science and Improve Technologies In the Deep Seas

The preservation of incentives to engage in scientific inquiry is a matter of great significance to us all. Attempts to improve our quality of life have led scientists into previously unexplored areas, leading to breakthroughs in many fields, from medicine (including discoveries that may some day allow us to fight or slow diseases such as cancer and AIDS), to bio-science and materials science, to improved technologies and communications generally (especially in the

area of fiber optics). The earth's seas provide virtually untapped promise for advancing these and other fields of scientific study.

The practical effect of the circuit conflict is to detract from the opportunities presented. The immediate effect of the decisions below, and the unresolved conflict among the circuits, is to undermine certainty and predictability of the incentives for innovative exploration. Beyond that, the decisions raise the specter that future projects will be unable to support the scientific research and effort that have been hallmarks of the SS *Central America* Project. *See generally* Charles E. Herdendorf, *Discovery in an Alien Environment,* American History Illustrated, Mar.-Apr. 1991, at 66.

As noted by courts at all levels Columbus-America Discovery Group's recovery efforts have been unparalleled in maritime history. *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked, and Abandoned Sailing Vessel,* 1989 AMC 1955, 1958 (E.D.Va. 1989). Columbus-America Discovery Group has developed new technologies and applications for maintaining the scientific and historical provenance of the *SS Central America,* thus preserving information and artifacts for future generations. *Id.* If the decision below stands, it will aid only those groups that sit on the sidelines and wait for a judicially-created windfall from the hard work and ingenuity of others.

Columbus-America's recovery effort is continuing beyond the ten percent (10%) of the shipwreck that has been explored to date, and will continue for many years into the future. Accordingly, the admiralty law standard for abandonment is a recurring issue that will confront Columbus-America in this case each time it files a motion for title to future recoveries.

"Abandonment" will be a crucial legal issue for Columbus-America for many years to come, since, each time it makes a recovery in the future, it will confront the express abandonment standard applied by the court below.[2]

The courts have repeatedly praised Columbus-America's scientific efforts. As the district court noted:

> From the inception of the project, [Columbus-America] had assembled experts in the various fields of science, archeology, history, maritime, marketing and publicity, to advise and assist in the use, care and preservation of the shipwreck site. Selection of the personnel to assist was from those most highly qualified and experienced in the contemplated activities....The same criteria [were] used in selecting the experts who were to evaluate, handle, care for and preserve the artifacts, scientific materials, information and knowledge obtained from the operation, and to preserve and make it available for future use by the public in research and learning.

Columbus-America Discovery Group v. Atlantic Mutual, et al., Civ. A. No. 87-363-N, 1993 WL 580900, *9 (E.D. Va. Nov. 18, 1993), *aff'd*, 56 F.3d 556 (4th Cir.), *cert. denied*, 516 U.S. 398 (1995). The court of appeals also observed:

> What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can

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[2] The Settlement Agreement between Columbus-America and the insurance companies does not abrogate Columbus-America's obligation to prove its title to future recoveries, nor does it affect the rights of claimants other than the insurance companies to assert claims of title to artifacts recovered on an on-going basis.

> say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination. The courts have concluded its efforts provide a standard against which all others should be judged."

Columbus-America Discovery Group v. Atlantic Mutual, et al., 56 F.3d 556, 572, 576 (4th Cir.), *cert. denied*, 516 U.S. 938 (1995).

While the possibilities for scientific information from new discoveries in the deep seas are virtually limitless, and the practical benefits many, the motivation to conduct the costly and time-consuming research necessary for such endeavors is greatly diminished when scientists and engineers are subject to protracted and expensive litigation over stale claims.

Advances in marine technology have enabled exploration and expanded our knowledge of the deep ocean. "The last twenty to thirty years has produced a revolution in the knowledge of the seabed. In spite of this knowledge, we are still in the pioneering state of exploration of this very large area of the earth's surface." Conrad G. Welling, *Mining of the Deep Seabed in the Year 2010*, 45 La. L. Rev. 1249, 1254 (1985). Technological innovations have led to great improvements in underwater electronics and sensors, including television and data handling, and underwater lighting and photography. *Id.* The development of complex robots such as *Nemo*, which was created by Columbus-America Discovery Group to recover artifacts from the *SS Central America* was itself a useful contribution to the emerging technology of undersea mineral exploration. *See Id.* at 1257.

To the financial backer of such technology, however, "the technology may not be available until a respectable return on investment is obtained." *Id.* at 1262. Indeed, "cost remains the most prohibitive factor" in deep sea exploration. Drew F. T. Horrell, Note: *Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery, 3* Pace Y.13. Int'l L. 309 (1991). Unlike shallow-water efforts, the costs involved in finding and recovering long-lost items in the oceans' depths are substantial, running into the many millions of dollars for projects that often are unlikely to yield a dime.

The location and conservation of submerged maritime historical and cultural resources similarly depends on advanced, and often costly and highly specialized technologies. Working underwater is hazardous and difficult, especially in the deep seas. Exploration technologies such as side-scan sonar, sub-bottom profilers, magnetometers, and remotely operated vehicles can be prohibitively expensive, and the scientists and explorers who use them must be able to rely on the predictability of their rights in the find. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation Background Paper,* OTA-BP-E-37, 8 (1987). Their ability to obtain financial backing, either through private venture capital or commercial loans, will usually hinge on their ability to point to a clear legal standard for abandonment—one undermined by the widening circuit conflict.

B. The Circuit Conflict Impedes Pioneering Scientific Efforts in the Deep Seas, Outer Space and Other Extreme Environments

Because of its practical effects in undermining the reasonable assurance scientists previously had of predicable legal rights, the conflict among the circuits, if unresolved, will likely undermine future scientific research and exploration in the deep seas. The conflict makes uncertain and unpredictable the management regime, as well as financial incentives, associated with technologically advanced discovery and recovery of deposits in the deep ocean, such as historic shipwrecks. The resulting lack of predictability will make it difficult to attract the enormous sums of private risk capital-and the enterprising scientists and engineers-required for such tenuous and challenging ventures. Resolving the current conflict is essential to ensuring certainty and to promoting the most sophisticated efforts to explore all aspects of our universe.

Many important advances in science have been made possible as a result of Columbus-America Discovery Group's perseverance. Columbus-America Discovery Group's scientists are performing eight types of experiments that fall generally within the fields of bioscience, physical and chemical studies, and historical analysis. These experiments include (1) deterioration of metal objects; (2) microbiological studies; (3) wood degradation studies; (4) indexing abyssal fauna; (5) concentration and composition of the food chain; (6) sedimentation studies; (7) biomedical and biochemical research; and (8) development of historical information. The scientific efforts have already led not only to discovery of eleven new species of marine life (some of which hold great

potential for medical applications), but also to advances in our knowledge in a variety of areas. *See generally* E. Herdendorf et al., *Science on A Deep Ocean Shipwreck* (1996).

Like exploration of the deep seas, space exploration will likely suffer adverse consequences if the decision below is allowed to stand. Because the untamed frontiers of both the deep ocean and outer space pose many of the same challenges to any human presence, legal practices and rules affecting human presence in the ocean will likely influence those in outer space. Many of the same issues affecting explorers and scientists in the deep seas will arise, and the space explorers will analogize to issues in deep ocean discovery, such as the concept of "telepresence." H.H. Almond, Jr., *Sea Salvage Law Could Solve' Chaos of Space Debris,* Defense News, Dec.10, 1990, at 34. A uniform rule is essential for exploration of such extreme environments as space and the deep ocean. *Cf Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970)(upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'") The deleterious effects of the court of appeals' decision below may thus extend beyond the deep seas, into future developments in other remote environments.

C. The Circuit Conflict Squanders Educational Opportunities in the Deep Seas

Deep sea exploration presents enormous educational opportunities, perhaps even exceeding the potential of the deep oceans for advancing scientific research. Columbus--America Discovery Group's efforts to present seminars for

young people interested in scientific careers, to develop radio broadcasts through ham radio operators and to create two interactive laser disc videos on "Investigating Science" and "Investigating History" illustrate this potential. *See generally* Horrell, *supra.*

For example, the *SS Central America* Project has given students the opportunity to learn how the efforts of such scientists and entrepreneurs led to the discovery of eleven new species of sea life. Students learn how experiments are currently being performed on some of these species in the hope of discovering antigens to be used in the fight against cancer and other diseases and how others are being studied. Other species are being studied to assist food production. The incentives provided by the repose, certainty, and predictability of the inferential rule of abandonment had, heretofore, allowed a team of chemists, biologists, oceanographers and historians to discover an extraordinary deep sea community of life forms, to recover a lost part of America's heritage and to provide educational programs in museums across the country. Conversely, the doubts and confusion created by the circuit conflict hamstrings such efforts. As the dissenting opinion in the Columbus-America case put it:

> On remand, the district court will be faced with the difficult, if not impossible, task of determining which claims were paid by the insurance companies and in what amounts. This problem is caused by the insurance companies' failure to maintain the records necessary to establish their claims. Had the insurance companies not abandoned their claims they surely would have maintained true records necessary established their amount.

Columbus-America v. Atlantic Mutual Ins. Co., 974 F.2d 450, 457 n.7. (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

If a responsible group such as Columbus-America Discovery Group is prevented from carrying its work to completion, no scientists, explorers, archaeologists, or entrepreneurs will risk undertaking such enormously expensive projects; and they certainly will have little ability to promote the kind of educational programs otherwise available. If such multidisciplinary efforts are not encouraged by a uniform, national standard for abandonment under admiralty law, all mankind will suffer. It is imperative to provide all future search and recovery efforts with the promise that their costs will be reimbursed and their efforts will be amply rewarded.

II. THE DECISION BELOW IS IN CONFLICT WITH THE OTHER CIRCUITS AND STATE SUPREME COURTS, AND SENDS THE WRONG MESSAGE TO OUR NATION' SCIENTISTS, EXPLORERS AND YOUNG PEOPLE

Other than a handful of insurance interests that persist in refusing to admit the undeniable, the cases, commentators, law professors and legislators have virtually unanimously recognized that the circuits are profoundly divided regarding the admiralty law standard for abandonment. In fact, three U.S. Courts of Appeals, themselves, have expressly recognized the conflict. *See Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 203 F.3d 291 (4th Cir. 2000); *Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds, and remanded sub*

nom. California v. Deep Sea Research, Inc., 523 U.S. 491 (1998); *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1091 (1998).

For example, the Fourth Circuit's express abandonment standard breaks with precedents in the First, Fifth, Sixth and Ninth circuits recognizing the ability of admiralty courts to draw an inference of abandonment based on circumstantial evidence. (Those circuits, in turn, are divided on the burdens of proof of abandonment and related issues). Moreover, the decision below applies a rule which, as a practical matter, imposes an impossible burden of proof on the explorer; in any case where a person purported to have succeeded to the interest of an original owner appears, the explorer must prove abandonment by clear and convincing evidence, "such as an owner's express declaration abandoning title." *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d at 464; *Sea Hunt v. The Unidentified Shipwreck Vessel*, 47 F. Supp. 2d at 688 (express abandonment standard binding on all shipwreck recoveries in Fourth Circuit).

In the case of shipwrecks lost for many decades, witnesses and documents will be unavailable to meet this burden and, without the ability to draw factual inferences of abandonment based on the totality of the circumstances, admiralty courts will have to award title to those interposing stale, exaggerated and perhaps fraudulent claims. And to the extent that scientists developing evidence through their exploration link specific long-lost objects to particular claimants, they will be similarly penalized, and conversely, have a disincentive to develop such information. Science, discovery, education and mankind will all suffer.

This sends the wrong message to our nation's young people who are considering science as a career. A rule of law that penalizes advances in marine technology, scientific inquiry and learning is wrong. The law should encourage, rather than discourage, the scientific acquisition of knowledge.

CONCLUSION

For the foregoing reasons, the National Association of Academies of Science respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL MARITIME HISTORICAL SOCIETY IN SUPPORT OF PETITIONER

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The National Maritime Historical Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage. The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society publishes *Sea History* magazine, the *International Register of Historic Ships* and its *Guide to American and Canadian Maritime Museums*. The Society initiated and secured the adoption of the Maritime Heritage Act of 1979, which allocated $5 million for historic ships, monuments and programs. NMHS has lent its influence and experience to the preservation of numerous individual ships, such as the bark *Elissa* (1877), now at Texas Seaport in Galveston, and the schooner *Ernestinea* (1894), now in New Bedford, Massachusetts, and the Liberty Ship *John W. Brown*, now sailing out of Baltimore. Current efforts spearheaded by NMHS include Project Experiment, the plan to build a replica of the Hudson River sloop, *Experiment*, that sailed to China in 1785, and a unique public/private partnership to save the *Wapama*, the last Pacific steam schooner.

In an effort to acquaint America's young people with the maritime heritage it is so diligently working to preserve, NMHS is active in several education projects. With Walter Cronkite, we launched the Maritime Education Initiative, developing case histories of successful educational programs in this field. NMHS also sponsors specific programs, including a Summer Sail Training Program for students on the frigate *Rose* and a boat building/rowing program at Nyack, New York. Our members have influenced such projects as the raising of money to help send the Liberty ship *Jeremiah O'Brien* to Normandy for the 50th anniversary of D-Day.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

The conflict among the circuits over the admiralty law standard for abandonment hampers the protection and preservation of our maritime heritage. In practical effect, the circuit conflict not only undermines the Abandoned Shipwreck Act of 1987 but also hampers the exploration and preservation of historic shipwrecks in international waters. If, as the Fourth Circuit held below, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. The express abandonment standard encourages concealment, and perhaps

outright destruction, of historical information by explorers of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

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QUESTION PRESENTED

Should the Court resolve the conflict among the circuits concerning the admiralty law test for the abandonment of property long-lost at sea?

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No.99-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL MARITIME HISTORICAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The National Maritime Historical Society was founded in 1963 and currently has more than 12,500 members.

The objective of the National Maritime Historical Society is to educate and challenge people by increasing their awareness and appreciation of our maritime heritage.[1] The Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society is vitally concerned about the destructive impact that the decision below will have upon the preservation of our maritime history. Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but for future generations, as well. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

The Society publishes *Sea History* magazine, the *International Register of Historic Ships* and its *Guide to American and Canadian Maritime Museums*. The Society initiated and secured the adoption of the Maritime Heritage Act of 1979, which allocated $5 million for historic ships, monuments and programs. NMHS has lent its influence and experience to the preservation of numerous individual ships, such as the bark *Elissa* (1877), now at Texas Seaport in Galveston, and the schooner *Ernestinea* (1894), now in New Bedford, Massachusetts, and the Liberty Ship *John W. Brown*, now sailing out of Baltimore. Current efforts

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[1] Pursuant to Rule 37.6, the National Maritime Historical Society notes that counsel for Petitioner assisted in the drafting of this Brief by providing an update on the status of the proceedings and recent case law on abandonment, docketing information and a service list, and that Petitioner has assisted in the service and copying of this Brief.

spearheaded by NMHS include Project Experiment, the plan to build a replica of the Hudson River sloop, *Experiment*, that sailed to China in 1785, and a unique public/private partnership to save the *Wapama*, the last Pacific steam schooner.

In an effort to acquaint America's young people with the maritime heritage it is so diligently working to preserve, NMHS is active in several education projects. With Walter Cronkite, we launched the Maritime Education Initiative, developing case histories of successful educational programs in this field. NMHS also sponsors specific programs, including a Summer Sail Training Program for students on the frigate *Rose* and a boat building/rowing program at Nyack, New York. Our members have influenced such projects as the raising of money to help send the Liberty ship *Jeremiah O'Brien* to Normandy for the 50th anniversary of D-Day.

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The conflict among the circuits over the admiralty law standard for abandonment hampers the protection and preservation of our maritime heritage. In practical effect, the circuit conflict not only undermines the Abandoned Shipwreck Act of 1987 but also hampers the exploration and preservation of historic shipwrecks in international waters.

If, as the Fourth Circuit held below, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. The express abandonment standard encourages concealment, and perhaps outright destruction, of historical information by finders of long-lost shipwrecks. Much of this information is irreplaceable, and could well be lost to all generations to come.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE ADMIRALTY LAW STANDARD FOR ABANDONMENT

The circuit conflict over the admiralty law standard for abandonment is a major impediment to the protection of our national maritime heritage. The academic community, both at national law schools and in departments of history and archaeology, have time and again recognized the unfortunate effects of the conflict among the circuits on the protection and conservation of shipwrecks of historic and/or archaeological value. Moreover, conflicts over the definition of abandonment, presumptions and burdens of proof have undermined the ability of courts to implement Congressional legislation in the Abandoned Shipwreck Act of 1987, together with historic protection outside state waters. *See e.g. Jones, The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan,* 30 J. Mar. L & Comm. 205, 213-220 (1999).

The circuit courts have diplomatically entreated the Court for its guidance in resolving the conflict. *Compare Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 203 F.3d 291 (4th Cir. 2000) *with Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds, and remanded sub nom. California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) *and Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1091 (1998) *and Columbus-America v. Atlantic Mutual*, 974 F.2d at 450, 472 (4th Cir. 1992) (Widener, J., dissenting).

The issue of abandonment has been central in virtually every major historic shipwreck case over the past two decades, and the division among the circuits is currently at it widest, ever. Over the past nine years, the circuits have exhibited confusion over the applicable standard, openly acknowledging that they are in conflict. Cases which turn on the admiralty law standard for abandonment are pending on the dockets of district courts all over the nation, and in the Fourth, Sixth, Ninth and Eleventh Circuits. Following the Court's decision in *California v. Deep Sea Research*, the division among the circuits has been expanding, and only the Court's attention can resolve the conflict.

The decision below reflects the most extreme—and in its harmful effects on historic shipwreck preservation, the most hostile—statement of the law of abandonment. While the circuit standards for abandonment are arrayed across a broad spectrum of views, at the opposite end of the spectrum from

the First, Fifth and Eleventh Circuits is the Fourth Circuit rule: where an owner asserts a claim title, there must be clear and convincing evidence of an express, affirmative abandonment. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d. at 464-65; *Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999). In the Fourth Circuit, where a person claiming ownership appears and asserts a claim, there can be no inference of abandonment. Instead, abandonment requires "an owner's express declaration abandoning title." *Sea Hunt*, 47 F. Supp. 2d at 687, *quoting Columbus-America v. Atlantic Mutual*, 974 F.2d. 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). A finding of abandonment can occur in only "two categories" of cases—either where owners "expressly and publicly abandoned their property" or where "no owner appears." *Compare Columbus-America Discovery Group v. Atlantic Mutual Insurance Company*, 974 F.2d. at 461, 464, 465; *Sea Hunt*, 47 F. Supp. at 687. In other words, in the Fourth Circuit, the standard for abandonment is the same for private and public vessels: express abandonment. *Sea Hunt*, 47 F. Supp at 688.

Since such an express declaration will never occur in the case of valuables, no abandonment will apply in any case where an alleged owner asserts a claim. The express abandonment approach discourages the search for and recovery of historic shipwrecks.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE CONSERVATION OF OUR NATION'S HISTORICAL AND CULTURAL HERITAGE, ENCOMPASSED IN THE ADMIRALTY LAW STANDARD FOR ABANDONMENT, IS AN IMPORTANT NATIONAL QUESTION

A. Congress and the President Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Abandoned Shipwrecks and Sunken Cultural Deposits

Conservation of our country's historical and cultural heritage is vital not only for the current generations of Americans, but also for future generations. Because America is a melting pot of many cultures, its history is particularly diverse and serves as one of our common links to the past.

Because of the importance of preserving our country's rich cultural and historical heritage, Congress passed the National Historic Preservation Act, 16 U.S.C. Sec. 470 et seq., in 1966. The Act establishes the policy of the United States of supporting the preservation of historical resources through a cooperative effort of federal, state and local governments, and contributing to "the preservation of non-federally owned prehistoric and historic resources and giv[ing] maximum encouragement to organizations and individuals undertaking preservation by private means." 16 U.S.C. Sec. 470-1(4). Congress' efforts to protect historic resources stem from the understanding that "preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy

benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. Sec. 470(b)(4).

In 1971, President Nixon reiterated this country's commitment to preserving our historical and cultural past by issuing an executive order calling for the federal government to restore and maintain federally owned objections of historical, architectural or archaeological significance, and to ensure that federal programs contribute to the preservation of non-federally owned sites, structures and objects. Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). The Executive Order also directs the federal government to take a leadership role in maintaining our country's historical and cultural heritage to ensure its preservation for future generations. *Id.*

The national policy of protecting historical and cultural resources extends to underwater sites. For example, Congress passed, and President Reagan signed into law, the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106 because of the importance of long-lost and abandoned shipwrecks to the historical and cultural heritage of the United States. The Act recognizes the need to "allow for the public and private sector recovery of shipwreck consistent with the historical values and environmental integrity of the shipwrecks and the sites." 43 U.S.C. Sec. 2103(a). In enacting the Abandoned Shipwreck Act, Congress incorporated what seemed to be a clear standard for coverage—the admiralty law standard for abandonment. The legislature sought to end the costly litigation that had infected state management of historic shipwrecks and had caused recurring state-federal conflicts regarding jurisdiction over historic shipwrecks. S. Rep. No. 241, 100th Cong., 1st Sess. 3 (1988); 134 Cong. Rec. H1178, 1183 (Mar. 28, 1988).

This national policy of protecting long-lost and abandoned shipwrecks, and other underwater cultural deposits, has been expressed, at various times, in other forms. *See, e.g.* The Marine Sanctuaries Act, 16 U.S.C. Sec. 1431 et seq. (1988) (amended 1992) (allowing the federal government to designate areas of the marine environment as a sanctuary based, *inter alia*, on the "historical, cultural, archaeological or paleontological significance" of the site involved. 16 U.S.C. Sec. 1433 (b)(1)(B).

B. The States Have Expressed the National Policy of Conserving Historical and Cultural Materials, Including Abandoned Shipwrecks and Sunken Cultural Deposits

Even before passage of the Abandoned Shipwreck Act, most states and territories had recognized the national public policy of conserving underwater cultural resources, such as long-lost abandoned shipwrecks. In fact, 27 states had already enacted historic preservation statutes pertaining to abandoned shipwrecks or underwater historical property. H.R. Rep. No. 514(I), 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 365. While these states' statutes predated the Abandoned Shipwreck Act, they were directed to similar concerns—and by and large turned on the standard for abandonment under admiralty law.

Since passage of the Act, other states have adopted statutes to protect historic shipwrecks, with "abandonment" as the key, operative standard for coverage. The goal of the state legislatures, as with the Congress, was to adopt a clear, black-letter standard so as to (1) avoid conflicts among state-federal jurisdiction; (2) allow effective management of historic

shipwrecks for purposes of historic preservation; and (3) avoid protracted, often expensive litigation over abandonment.

The Court has held that the meaning of "abandoned" under the ASA is the same as its meaning under the law of admiralty, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998). The circuit conflict over abandonment has, however, essentially abrogated the aims of Congress and the state legislatures. The conflict among the circuits has defeated or seriously impeded the ability of the states to manage the protection of historic shipwrecks in their waters, has generated jurisdictional conflicts between the state and federal governments, and has spawned expensive and time-consuming litigation over the admiralty law standard for abandonment—diverting resources from historic protection to lawsuits.

Like federal efforts, state programs have been directed toward responsible recovery and conservation of items from the sea. Of similar importance have been concerns over the protracted and costly litigation spawned by the existing circuit conflict and confusion over the admiralty law standard for abandonment. Yet, these same concerns are generated by the Fourth Circuit's continuing adherence to the express abandonment theory, and the conflict among the other circuits concerning presumptions and burdens of proof for a maritime abandonment.

C. The Issue of the Admiralty Law Standard for Abandonment Is Important to the National Policy of Conserving Our Historical and Cultural Heritage

The issue of when long-lost shipwrecks are effectively abandoned is a question of first impression for the Court, on

which the circuits are in conflict. Although the question of what rights accrue to a finder or salvor upon locating a shipwreck can be traced by to Rhodian and Roman maritime law, *see* M. Norris, 3A *Benedict on Admiralty: The Law of Salvage* § 1, at 4-7 (1958 & Supp. 1974), the modern development of the law and refinement of maritime technology has taken place in the post-World War II era. We are thus at the crossroads requiring the Court's attention to this case.

Determination of when a shipwreck is abandoned affects preservation both under the Abandoned Shipwreck Act and in areas not covered by the Act. If, as the Fourth Circuit has held, abandonment cannot be inferred as a fact from circumstantial evidence, we risk losing forever a window into the past and the opportunity to study and share our rich cultural heritage. Much of this information is irreplaceable, and now could be lost to all generations to come.

Accordingly, the issue affects literally millions of Americans, living and unborn, and warrants the Court's attention.

III. ADMIRALTY COURTS SHOULD BE PERMITTED TO INFER ABANDONMENT OF LONG-LOST SHIPWRECKS BASED ON CIRCUMSTANTIAL EVIDENCE

There are overwhelming policy reasons for resolving the conflict among the circuits to allow admiralty courts to infer abandonment based on circumstantial evidence. Application of the rule of inferred abandonment aids certainty and predictability of legal rights. As time passes, memories fade, claims become stale, witnesses are lost, and the chances of

mistake, or even fraud, become great. The corresponding need for repose increases. Expending resources in litigation over title, when such resources could be better spent on historic preservation and scientific study, is wasteful and will burden our court system and historical preservation efforts for years to come.

Equally important, the express abandonment standard applied by the decision below will encourage concealment, and perhaps outright destruction, of historical information by explorers of long-lost shipwrecks. The law should encourage investigation and preservation of information about historic shipwrecks, consistent with our national policy. Those who find shipwrecks should have every incentive to act openly, and to strive to determine as much as possible about the shipwrecks. The Fourth Circuit's opinion provides precisely the opposite incentive. By according a presumption of ageless vitality to ownership interests, the decision below discourages explorers from investigating conditions, items, and structures at wreck sites that may link a particular recovered artifact with a specific long-gone crew member, cargo interest, or passenger. In effect, the explorer has a disincentive to develop historical information that might shed valuable light into the provenance and history of the shipwreck.[2]

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[2] Through the use of new and sophisticated marine technologies, shipwrecks can yield information not only from their cargoes, but also from their structures and the utensils, plates, glassware, cutlery, and clothing found aboard historic shipwrecks. Geisecke, *Shipwrecks: The Past in the Present,* 15 Coastal Management 179, 180 (1987). Ironically, under the Fourth Circuit's approach, if a finder develops historical information which, even tenuously, links an artifact to a specific crew member, cargo owner, or passenger, the

The *Columbus-America* case presents squarely the admiralty law standard for abandonment. *See* Jones, *supra*. In the future, when Columbus-America asks for a declaration of title to items it recovers from the *SS Central America*, the express abandonment standard will be binding. S*ee Sea Hunt v. The Unidentified Shipwreck Vessel*, 47 F. Supp. 2d at 688. The district court's published opinion rests on clear factual findings, and its decision was reversed by the court of appeals based on a clearly-stated legal rule prohibiting a finding of

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fruit of its discovery may turn into a claim of ownership that has been stale for many generations. The contrast in conduct between the insurance companies and Columbus-America is a striking reminder of the results of applying the express abandonment standard. In contrast to Columbus-America's diligence and perseverance in the face of adversity, the insurance companies sat on the sidelines for 135 years, advanced not a penny to help find or recover the SS *Central America*, and then, after Columbus-America had taken all the risk and done all the work, asserted a claim of ownership despite acknowledging that the entire basis for their claim was, at its core, newspaper articles. In contrast to Columbus-America's professionalism, at every turn they engaged in mud-slinging, making repeated obfuscating *ad hominem* attacks on Columbus-America and finally thoroughly confusing the senior district judge, who had heard none of the evidence and had at the eleventh hour been called out of retirement after the death of the district judge who had sat on the case for the prior decade of the litigation In contrast to Columbus-America's careful, meticulous recovery methods to preserve the science and history of the SS *Central America*, they propounded "smash and grab" salvage methodology—to go in, get the gold at any cost, and in the process, destroy the shipwreck's history, science and provenance.

abandonment in any case where an owner asserts a claim, absent an express abandonment.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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No. 99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE CO., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE, THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, ADVISORY COUNCIL ON UNDERWATER ARCHAEOLOGY, COUNCIL OF AMERICAN MARITIME MUSEUMS, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NORTH AMERICAN SOCIETY FOR OCEANIC HISTORY, SOCIETY FOR AMERICAN ARCHAEOLOGY, AND SOCIETY FOR HISTORICAL ARCHAEOLOGY, IN SUPPORT OF THE PETITIONER

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July 5, 2000

38pp

No. 99-1935

IN THE
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COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al,*
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, *ET AL.*, IN SUPPORT OF THE PETITION

The National Trust for Historic Preservation in the United States, Advisory Council on Underwater Archaeology, Council of American Maritime Museums, National Conference of State Historic Preservation Officers, North American Society for Oceanic History, Society for American Archaeology, and Society for Historical Archaeology respectfully petition this Court pursuant to Rule 37.2(b) for leave to file an *amicus curiae* brief, filed simultaneously herewith, in support of the above-captioned

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.[1]

Columbus-America Discovery Group, Inc., has consented to the filing of this brief, as evidenced by the letter filed with the Clerk of this Court. However, Respondent Atlantic Mutual Insurance Co., *et al*, has withheld its consent.

The National Trust for Historic Preservation was chartered by Congress in 1949 as a private, nonprofit corporation to further the historic preservation policies of the United States and to facilitate public participation in historic preservation. 16 U.S.C. § 468. Congress intended the National Trust to mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources. S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. It is in the spirit of this charter that the National Trust seeks to express its views in this case, together with the co-*amici* organizations.

The National Trust has approximately 250,000 individual members and nearly 3,500 member organizations involved in local historic preservation activities nationwide. These members have a substantial interest in upholding and enhancing the effectiveness of federal and state historic preservation laws. The National Trust also provides extensive advisory and technical services to state and local governments that have enacted archeological and historic preservation laws.

The National Trust frequently participates both as *amicus curiae* and as a plaintiff in cases involving the enforcement, interpretation and constitutionality of historic preservation laws. In addition, the National Trust testified before Congress in support of the Abandoned Shipwreck

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[1] The interests of the *amici* organizations are described more fully in the Appendix to the Brief.

Act, and has published legal articles on the protection of historic shipwrecks.[2]

The *amici* organizations particularly wish to express their views as friends of the Court because of the national importance of the issue in this case, which the *amici* have followed closely. This case provides the Court with an opportunity to resolve the conflict among the lower federal courts concerning the standard for determining whether a shipwreck has been abandoned under admiralty law and the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106. *Amici* believe that the decision in this case negatively impacts the regulatory authority of state governments to protect their underwater historic resources.

The National Trust and many co-*amici* have previously participated as *amici* in cases involving historic shipwrecks both before this Court, in lower federal courts and state courts.[3] The National Trust and co-*amici* have monitored litigation concerning historic shipwrecks both before and after the passage of the ASA and have a unique national perspective on the effect of such litigation throughout the

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[2] *See, e.g.*, Thompson M. Mayes, *Current Legal Issues in the Law of Historic Shipwrecks*, 5 Preservation L. Rep. 2027 (1986); Robert Moyer, *The Law of Shipwrecks: Conflict and Controversy*, 2 Preservation L. Rep. 2072 (1983).

[3] *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 746 F. Supp. 1334 (N.D. Ill. 1990) (separated in subsequent proceedings), *rev'd, Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 513 U.S. 961 (1994); *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992); *Illinois ex rel. Illinois Historic Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999).

country. Thus, the National Trust and co-*amici* have a substantial interest in strengthening the interpretation of federal and state historic preservation laws, including the ASA.

For the reasons stated above, *amici curiae* respectfully request that this Court grant their motion to file the attached brief in support of the petition for a writ of certiorari filed by Columbus-America Discovery Group, Inc.

Respectfully submitted,

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July 5, 2000

QUESTION PRESENTED

Should the Court resolve the existing conflict among the U.S. Courts of Appeals for the First, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits regarding the standard for abandonment under admiralty law, which the Court has previously held governs the definition of abandonment under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101?

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INTERESTS OF THE AMICI CURIAE

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private nonprofit corporation to facilitate public participation in historic preservation and to further the historic preservation policies of the United States. 16 U.S.C. § 468. Additional information describing the National Trust for Historic Preservation, Advisory Council on Underwater Archaeology, Council of American Maritime Museums, National Conference of State Historic Preservation Officers, North American Society for Oceanic History, Society for American Archaeology, and Society for Historical Archaeology is included in the Appendix.[1]

The National Trust and co-*amici* have a strong interest in the preservation of shipwreck sites for their historical, archaeological, scientific, and cultural value. The National Trust, co-*amici*, and other national preservation and archaeological groups strongly advocated for the passage of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (hereinafter "ASA" or the "Act")[2] to clarify states' authority to protect historic shipwrecks. The National Trust

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The National Trust advocated passage of the ASA, and testified before Congress on several occasions in support of the legislation. *See Abandoned Shipwreck Act of 1987: Hearing on H.R. 74 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine & Fisheries*, 100th Cong., 1st Sess. (1987) (testimony of J.J. Walter, President, National Trust); *Abandoned Shipwreck Act of 1987: Hearings on S. 858 Before the Subcomm. on Public Lands, Nat'l Parks & Forests of the Senate Comm. on Energy & Natural Resources*, 100th Cong., 1st Sess. (1987) (testimony of J. Revell Carr, Trustee, National Trust).

and other co-*amici* seek to ensure that these fragile and irreplaceable resources are appropriately preserved and protected as cultural and archaeological sites, rather than as commercially exploitable property. Although the ASA does not apply to the *S.S. Central America*, the shipwreck at issue here, this case provides the Court with the opportunity to resolve conflicting interpretations among the lower federal courts of whether a shipwreck has been "abandoned" under admiralty law and the ASA. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998).

REASONS FOR GRANTING THE WRIT

Amici curiae believe this Court's review is necessary to resolve conflicting definitions of abandonment in the circuit courts and differing applications of the standard to be applied in determining title to abandoned shipwrecks. In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), this Court stated that the definition of "abandoned" under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. § 2105, "conforms with its meaning under admiralty law." 523 U.S. at 508. However, the federal and state courts applying the term under traditional admiralty law, which governs the ownership of abandoned shipwrecks outside the states' jurisdiction—and under the ASA, which governs abandoned shipwrecks inside the states' territorial limit—have defined abandonment in a variety of inconsistent ways. Without clear guidance, the Fourth Circuit has adopted an extreme definition of abandonment that requires the most stringent burden of proof. The definition used by the Fourth Circuit is inconsistent with other circuits, inconsistent with admiralty precedent, and contributes to the ongoing judicial confusion about the treatment of shipwrecks throughout the United States. This confusion severely limits both the state and federal governments' ability to regulate these important resources as Congress intended.

THE COURT'S REVIEW IS NEEDED TO RESOLVE CONFLICTING STANDARDS FOR ABANDONMENT AND TO ESTABLISH A UNIFORM STANDARD FOR THE TREATMENT OF HISTORIC SHIPWRECKS

A. Abandonment Is Interpreted and Applied Inconsistently by Courts Around the Country

The meaning of the term "abandoned" is a fundamental issue, both in admiralty law and under the ASA. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). In admiralty law, whether a shipwreck is defined to be abandoned dictates whether the finder of the shipwreck receives title or whether title remains with the original owner or successor in interest. Under the ASA, the term "abandoned" dictates whether or not the ASA will apply at all. 43 U.S.C. § 2105.

Courts are interpreting "abandonment" in an inconsistent manner, adopting different standards and burdens of proof, and using similar evidence in seemingly similar cases to reach dramatically different results. Although the Fourth Circuit was not required to consider the ASA in its decision concerning the *S.S. Central America*, the court's interpretation of abandonment is significant as precedent in other cases where the ASA applies. This Court confirmed in *California v. Deep Sea Research* that "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." 523 U.S. at 508. Thus, the conflict among the courts over the standard for abandonment causes enormous confusion, not only under admiralty law, but also under the ASA.

Presently before this Court are two petitions seeking clarification of the standard for abandonment: the instant case, and *Yukon Recovery v. Ocean Mar*, 205 F.3d 1189 (9th Cir. 2000), *petition for cert. filed*, No. 99-1958 (concerning the *S.S. Islander*, which sank near Juneau in 1901 with a

large shipment of gold). *Amici* urge the Court to address this issue of abandonment raised by these conflicting cases.

B. The Inconsistent Interpretations of Abandonment Result in Confusion, Costly Litigation,and the Loss of Immensely Significant Archaeological Sites

The courts' inconsistent definitions of abandonment create a range of problems for the treatment and disposition of historic shipwrecks under the ASA and in admiralty law.[3] This confusion generates costly litigation and diverts government funds to time-consuming and uncertain defenses of their authority to regulate these sites. As a result, funds that could be used to preserve artifacts through underwater archaeological excavations are wasted instead on litigation, and the public is denied access to the historical information these shipwrecks contain. In addition, the current circuit conflict over the standard of abandonment promotes forum shopping in shipwreck disputes. Because venue is satisfied in any district where recovered artifacts are found or where the salvor has *in personam* jurisdiction, a salvor wishing to assert title to a shipwreck might be encouraged to shop for the forum that adheres to the abandonment standard most favorable to the particular facts of his case. *See* 28 U.S.C. § 1333; *Treasure Salvors v. The Unidentified Wrecked &*

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[3] While the Court of Appeals' decision on what constitutes abandonment will place an undue burden on the states' efforts to preserve historic shipwrecks, the US will also be adversely affected where such shipwrecks lie on public lands under its ownership or control. Under the ASA, title to abandoned shipwrecks on federal public lands stays within the United States' jurisdiction. 43 U.S.C. § 2105(d). The United States has the responsibility of protecting and managing the land, marine life and historic artifacts of its national parks, national seashores and national marine sanctuaries, including abandoned shipwrecks embedded in those submerged lands. *See Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla.1993).

Abandoned Vessel, 640 F.2d 560, 567-68 (5th Cir. 1981).

This Court's review is needed to resolve the conflicting interpretations of abandonment, because the resulting confusion significantly undermines the ability of the states to regulate resources entrusted to them by Congress in the ASA. These judicial conflicts only exacerbate the confusion and inconsistencies in the treatment of shipwrecks themselves, which have been the subject of increasing controversy ever since the technologies were developed to locate and excavate these resources.

C. Abandonment Is Key to the States' Protection of Historic Shipwrecks As Archaeological Sites for the Public

Technological advances in the late twentieth century—such as improvements in SCUBA technology and the development of sidescan sonar and remote-controlled submersible vessels—led to the discovery of historic shipwrecks on a much greater scale than ever before envisioned. Archaeologists and historians began to excavate shipwreck sites in accordance with scientific standards, uncovering the vast information these sites contain about maritime history and culture and making this information available for public interpretation. Simultaneously, treasure salvors began to realize the possibility of reaping pecuniary gain from the sometimes immense monetary value of the artifacts located in shipwreck sites.

Historic shipwrecks are veritable time capsules of our heritage. Because they lie undisturbed until discovery, every historic shipwreck provides an important glimpse of the past—a tableau that tells us about a ship, its cargo, and the lives of its crew and passengers. The study of these sites provides valuable information about maritime history and technology, international and regional trade and culture, and the seafaring life.

Without proper regulation, the commercial salvage of historic shipwrecks can easily result in the loss or destruction of priceless legacies. Where recovery techniques fail to preserve and document information from the shipwreck, archaeologists lose crucial pieces of the complex puzzle that tells the story of a vessel and its times. If proper conservation techniques are not applied to the vessel and its contents, the rapid deterioration of ancient materials exposed to surface conditions makes it impossible for archaeologists to glean accurate scientific and historical information from the remains. Once lost, these resources can never be recovered or replaced.

As access to historic shipwrecks increased, the states recognized the immense significance of these sites and began to regulate shipwrecks in their territorial waters in order to protect the shipwrecks' integrity as archaeological resources, just as they regulated cultural resources on state lands.[4] Most states have antiquities or archaeology statutes that specifically regulate historic shipwrecks as underwater archaeological sites. These statutes usually allow the state historical agencies to regulate excavation of the wrecks, either through a permitting process or a contracting arrangement. Typically, a state would grant a permit or enter into a contract with the private salvor that discovered the shipwreck, requiring the site to be excavated in a manner that preserves the archaeological information it contains so that the public can benefit from the historical interpretation made possible by the site.

State regulation of historic shipwrecks was challenged

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[4] To date, all 50 states have enacted laws to encourage or require preservation of areas with historic or cultural significance and at least 28 states have specific laws relating to the treatment of underwater archaeological resources. *See* H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988); *see also* CONSTANCE BEAUMONT, SMART STATES, BETTER COMMUNITIES 24 (1996).

by commercial salvors, who often preferred to avoid the expense and delay of treating shipwrecks as archaeological resources. Salvors began to challenge these regulations under admiralty law, because in admiralty the courts were more likely to award the salvors possession of or title to the historic shipwrecks, without restricting the sale or salvage of the artifacts.[5]

D. "Abandonment" Is a Critical Term Under Admiralty Law

There are two theories in admiralty law under which a salvor could obtain rights to a shipwreck and recover artifacts from the site: the law of salvage and the law of finds. A salvor seeking control of a shipwreck would usually bring claims under both salvage and finds, requesting that the courts award either exclusive possession under salvage law or, in the alternative, actual title under the law of finds. *See, e.g., Cobb Coin Co., Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel,* 549 F. Supp. 540, 556 (S.D. Fla. 1982). The definition of abandonment is critical to the

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[5] Prior to the ASA, the principal problem with state assertion of jurisdiction over shipwrecks was that there was no express grant of title to shipwrecks within the three-mile limit under the Submerged Lands Act. 43 U.S.C. §§ 1301-1315. This weakness was exploited by treasure salvors who brought a series of challenges in federal court against the states' rights to control and manage historic shipwrecks. *See, e.g., Cobb Coin Co., Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981) and 549 F. Supp. 540 (S.D. Fla. 1982) (Florida state lands); *Chance v. Certain Artifacts Found & Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) (Georgia state lands); *Maritime Underwater Surveys v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983) (Massachusetts state lands); *Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983), *aff'd*, 758 F.2d 1511 (11th Cir. 1985) (Biscayne National Park); *People v. Massey*, 358 N.W.2d 615 (Mich. App. 1984) (Michigan state lands).

distinction between these two legal theories. The law of salvage is predicated on the assumption that an owner exists and has not abandoned the vessel.[6] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-7, at 512 (1987). The law of finds, on the other hand, is based on the idea that the property has been abandoned and the finder of the abandoned property is entitled to ownership. *See, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1513-14 (11th Cir. 1985). Whether or not a shipwreck was "abandoned" would determine whether the salvor received actual title to the shipwreck under the law of finds or simply a salvage award, which was enforced as a lien against the ship.

After 1960, modern technology began to open up much greater access to ancient or long-lost shipwrecks, and the law of finds was increasingly used as an adjunct to salvage claims. *See Martha's Vineyard Scuba Headquarters*, 833 F.2d at 1065; *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452 (E.D. Va. 1960); David R. Owen, *The Abandoned Shipwreck Act of 1987: Goodbye to Salvage in the Territorial Seas,* 19 J. Mar. L. & Com. 499, 510 (1988). Borrowed from the common law "finders-keepers" principle, the law of finds allowed the salvor to obtain title to an abandoned shipwreck rather than simply a salvage award, and avoided the fiction that an owner of a long-lost wreck was still in existence. However, if property was found embedded in the soil of land owned by another, an exception to the law of finds would apply, providing that the property

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[6] The law of salvage developed to encourage salvors to take the sometimes precarious steps necessary to rescue ships in marine peril. Salvage law would guarantee a reward for saving valuable property and returning those items to the stream of commerce. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-7, at 512 (1987).

belonged to the landowner. *Klein,* 758 F.2d at 1519.

Nonetheless, admiralty courts, accustomed to adjudicating disputes in commercial settings, have struggled when called upon to determine the appropriate law to apply to long-lost historic vessels. One early key issue was whether the sovereign–either the state or the United States–held title to abandoned shipwrecks simply by virtue of its sovereignty, under the accepted admiralty principle of sovereign prerogative. *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 340-42 (5th Cir. 1978). Ultimately, it was determined that the U.S. government had the authority to assert ownership of abandoned shipwrecks but had not done so. *Id.* at 341-42.

The case that threw the entire area into confusion was the *Cobb Coin* decision, which held that state regulation of historic shipwrecks conflicted with and was preempted by admiralty law. *Cobb Coin,* 549 F. Supp. 540 (S.D. Fla. 1982). As a result of that decision, the entire state regulatory framework was cast into doubt, and states were subjected to an increased threat of litigation whenever they attempted to regulate historic shipwrecks. *See Jupiter Wreck, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985); *Subaqueous Exploration & Archaeology, Ltd. v. The Unidentified, Wrecked & Abandoned Vessel, Etc.*, 577 F. Supp. 597, 608 (D. Md. 1983); *Cobb Coin*, 549 F. Supp. 540 (S.D. Fla. 1982); *Cobb Coin*, 525 F. Supp. 186 (S.D. Fla. 1981).

E. Congress Intended to Resolve the Inconsistent Treatment of Historic Shipwrecks When it Passed the Abandoned Shipwreck Act of 1987, Relying on the Traditional Admiralty Definition of Abandonment

In response to the increasing conflicts over the potential uses of historic shipwrecks, along with increasing confusion

concerning the appropriate judicial forum and legal principles for resolving these conflicts, Congress enacted the Abandoned Shipwreck Act of 1987.[7] Recognizing the significance of historic shipwreck sites, the Congress stated:

> As new technologies have allowed the recovery of wrecks that have been lost for long periods of time, a new concern has been developed for the historic and recreational interests in shipwrecks. Shipwrecks are no longer viewed as only lost commercial resources that should be salvaged so that the goods can be returned to commerce. Rather, many shipwrecks are . . . viewed as invaluable and irreplaceable archeological resources.

S. Rep. No. 241, 100th Cong., 1st Sess. 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 365. Congress determined that historic abandoned shipwrecks were most appropriately owned and managed by the states, which have expertise and established programs for the management of cultural resources.[8] Congress' intent was to clarify the states' authority to exercise stewardship over these resources so states would no longer be forced to squander their time and money defending their title to historic shipwrecks in federal admiralty courts. *See id.*; 134 Cong. Rec. H1178, 1183 (1988).[9]

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[7] Congress stated that litigation "led to the confusion over the ownership of, and responsibility for, historic shipwrecks in State waters. This confusion led to the [ASA] . . . ." H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988).

[8] *See supra* note 4.

[9] "The States spend a disproportionate amount of effort and expense in admiralty court arguing for jurisdiction over the shipwrecks on their State-submerged lands. Admiralty law developed in the ancient Mediterranean . . . . It was designed to encourage the retrieval of commercial goods, not the protection of cultural resources." 134 Cong.

Although the ASA was passed with the express intention of resolving the legal confusion surrounding the treatment of historic shipwrecks, the confusion and inconsistent treatment by the courts have not only continued, but actually increased since the passage of the ASA. Courts have been called upon to resolve litigation over the constitutionality of the ASA,[10] the application of the Eleventh Amendment,[11] and now, increasingly, the issue of abandonment.

F. The ASA Only Applies to Abandoned Shipwrecks

Under the ASA, the federal government asserted title to certain historic shipwrecks and transferred that title to the

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Rec. H1178 (1988).

[10] *See Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 755 F. Supp. 213 (N.D. Ill. 1991), *rev'd*, 960 F.2d 665 (7th Cir.), *cert. denied*, 506 U.S. 985 (1992); Zych *v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Lady Elgin,"* 746 F. Supp. 1334 (N.D. Ill. 1990), *rev'd sub nom. Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 811 F. Supp. 1300 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 513 U.S. 961 (1994).

[11] Some states sought to avoid the jurisdiction of federal admiralty courts by asserting that state claims of title to shipwrecks could not be heard in federal courts because of the Eleventh Amendment. *See Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981); *Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part, rev'd in part*, 458 U.S. 670 (1982); *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); *Riebe v. The Unidentified, Wrecked & Abandoned 18th Century Shipwreck*, 691 F. Supp. 923 (E.D.N.C. 1987). However, this Court held in *California v. Deep Sea Research*, that the Eleventh Amendment does not bar a federal court's jurisdiction over an *in rem* admiralty action where the state does not have possession of the vessel. 523 U.S. at 508.

states on whose submerged lands the shipwrecks are located. 43 U.S.C. § 2105. Congress chose to define the vessels covered under the Act by using characteristics common to historic shipwrecks. For example, Congress structured the ASA to apply only to "abandoned" shipwrecks, intending that more modern shipwrecks would not be included within the scope of the Act. In addition to being abandoned, all shipwrecks covered by the Act must fall into a specific category indicating that they are likely to be historic. For instance, older shipwrecks would have a higher tendency to become *embedded* over time, either in the seabed or in coralline formations. Congress also included shipwrecks *lying on* submerged lands that were eligible for inclusion in the National Register of Historic Places, in order to include shipwrecks that were located on rocks, or were not embedded for some other reason, but were nevertheless historic. *Id.* § 2105(a).

Thus, a sunken vessel is covered by the ASA if it is (1) abandoned; (2) located in or on a state's submerged lands; and (3) either embedded in the sea floor or determined eligible for listing in the National Register of Historic Places. *Id.* Once the vessel is determined to be abandoned under the ASA, the states then have authority to regulate the site by requiring salvors to excavate in accordance with professional archaeological standards. *See Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 682 (E.D. Va. 1999).

G. Congress Intended to Define Abandonment Under the Traditional Admiralty Standard

Traditional admiralty law allows abandonment to be inferred by circumstantial evidence. *Chance v. Certain Artifacts Found & Salvaged from The Nashville, A/K/A, The Rattlesnake*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd mem.*, 775 F.2d 302 (11th Cir. 1985). Legislative reports

highlight Congress' understanding of "abandonment" under admiralty law at the time the ASA was enacted:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 1, at 2 (1988). Similarly, the House Merchant Marine and Fisheries Committee Report notes:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights . . . . The act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514, *supra*, pt. 2, at 5 (1988).

The meaning of the term "abandoned" was further clarified in guidelines issued by the National Park Service pursuant to Section 5 of the Act, 43 U.S.C. § 2104. The Guidelines state:

> *Abandoned* shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. *By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to*

> *provide legal notice of abandonment* to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 408), *an owner shows intent to give up title.*

55 Fed. Reg. 50,120 (1990) (emphasis added).

The traditional admiralty standard used in determining abandonment is that it "may be accomplished by either an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." *Bunge Corp. v. Agri-Trans Corp.*, 542 F. Supp. 961, 969 (N.D. Miss. 1982) (citing 3A BENEDICT ON ADMIRALTY § 134 (7th ed. 1980)), *aff'd in part, vacated in part on other grounds*, 721 F.2d 1005 (5th Cir. 1983). In the absence of express statements or acts, abandonment is determined from all of the circumstances. *Chance*, 606 F. Supp. at 804. Most admiralty courts have held that abandonment may be inferred from the passage of time, absent affirmative acts showing non-abandonment.[12]

However, there is an exception to the traditional admiralty standard, which provides that when sovereign vessels are owned by the United States, the shipwreck cannot be abandoned other than through an express statement of intent by the sovereign to abandon the vessel. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 710 (1982). However, the express abandonment standard has traditionally been applied solely to sovereign vessels and not to privately owned vessels. It is therefore unclear why the Fourth Circuit applied this standard in the context of non-sovereign shipwrecks, such as the *S.S. Central America*.

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[12] This rule is sometimes referred to as the doctrine of *animus revertendi* (the owner has no intention of returning). *Chance*, 606 F. Supp. at 804.

H. Confusion Exists Among the Circuits Regarding the Appropriate Definition of Abandonment and the Applicable Burden of Proof Under the ASA and Traditional Admiralty Law

In recent years, both federal courts and state courts have been applying inconsistent standards for proving that shipwrecks have been considered abandoned. While some courts apply a rule that requires clear affirmative acts of abandonment such as express declarations, others simply require a passage of time. The lack of a clear standard to follow, along with inconsistent application of requirements to determine abandonment, is expressly acknowledged by the federal circuit courts. In fact, the Fourth Circuit in the case at bar struggled with the lack of a defined standard and invited this Court to resolve the issue:

> [W]e agree that the majority's abandonment test [in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)] was rejected by two other courts of appeal, the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Jonathan*, . . . and the Sixth Circuit in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence* . . . .
>
> ****
>
> A comparison of our earlier decision in this case with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question . . . .

Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 203 F.3d 291, 304 (4th Cir. 2000).

Comparing the standards established by the Sixth and Ninth Circuits, the Fourth Circuit has chosen to adopt the most stringent rule, requiring evidence of express abandonment if an alleged owner asserts title to the goods or the vessel. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461-62 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). Express abandonment is extremely difficult to establish as it fails to consider any other circumstances. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, Known as the Captain Lawrence*, 105 F.3d 1078, 1085 (6th Cir. 1997) (*Fairport II*), *vacated*, 523 U.S. 1091 (1998), *on remand*, 177 F.3d 491, 499 (6th Cir. 1999) (*Fairport III*).

The express abandonment standard, as adopted by the Fourth Circuit, means that unless there is evidence of an expressly stated intent to abandon the shipwreck, no other party, including the state, may appear and claim title to the shipwreck, regardless of any other factors, such as the passage of time or the character of the vessel. *Columbus-America*, 974 F.2d at 461-62. Application of such a stringent rule ignores the diverse factual circumstances involved in abandoned shipwreck cases. Courts have considered many factors in determining abandonment, including the lapse of time, prior salvage efforts, availability of technology, retention of records of ownership, and efforts to prevent unauthorized salvage efforts. *See, e.g., Yukon Recovery*, 205 F.3d 1189 (9th Cir. 2000); *Deep Sea Research*, 102 F.3d 379 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds & remanded sub nom. California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Martha's Vineyard Scuba Headquarters*, 833 F.2d 1059 (1st Cir. 1987); *Moyer v. The Wrecked & Abandoned Vessel, Known as the Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993). Failing to consider

these important factors is inconsistent with the traditional standard of admiralty law.

By contrast, the First, Third, Fifth, Seventh, and Eleventh Circuits have generally applied the traditional interpretation under admiralty law, allowing for a presumption of abandonment based upon circumstantial evidence of intent, such as a lapse of time.[13] *See, e.g., Zych v. The Unidentified, Wrecked & Abandoned Vessel, Believed to be the SB "Seabird,"* 941 F.2d 525 (7th Cir. 1991); *Martha's Vineyard,* 833 F.2d at 1065 (abandonment is found when "articles have been presumptively abandoned, i.e., either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title"); *Klein,* 758 F.2d at 1514; *Treasure Salvors,* 569 F.2d at 337; *Sunken Treasure, Inc. v. The Unidentified, Wrecked & Abandoned Vessel,* 857 F. Supp. 1129 (D.V.I. 1994).

The Sixth and the Ninth Circuits have also discussed the divergence of authority among the circuits. *See, e.g., Fairport II,* 105 F.3d at 1084; *Deep Sea Research,* 102 F.3d at 387-88, *aff'd in part, vacated in part on other grounds,* 523 U.S. 491 (1998). Both courts summarily rejected the Fourth Circuit's standard as departing from traditional admiralty law. In fact, in *Fairport II,* the court stated that "[c]ommon sense makes it readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." 105 F.3d at 1085. Accordingly, these circuits allow states to prove by inference that a long-lost shipwreck is abandoned under the ASA and admiralty law. *See id.*; *Deep Sea Research,* 102 F.3d at 388. "Permitting proof of

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[13] Courts typically state that they are following the traditional admiralty definition of abandonment used before the ASA, which is what Congress intended. *See also Illinois ex rel. Illinois Historic Preservation Agency v. Zych,* 710 N.E.2d 820 (Ill. 1999).

abandonment by inference, of course, broadens the applicability of the statute and facilitates the achievement of Congress' goals." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, Known as the Captain Lawrence*, 177 F.3d 491, 508 (6th Cir. 1999) (*Fairport III*). However, in practice the Ninth and Sixth Circuits themselves have departed from the traditional standard in divergent ways.

Recently, on remand from this Court in *Fairport*, 523 U.S. 1091 (1998), the Sixth Circuit created even more confusion by applying the standard of clear and convincing evidence as the burden of proof for abandonment by inference. *Fairport III*, 177 F.3d at 508. The Fourth Circuit also requires a clear and convincing evidence standard. *See Columbus-America*, 974 F.2d at 461. The Ninth Circuit, by contrast, requires a preponderance of the evidence standard to show abandonment. *See Yukon Recovery,* 205 F.3d at 1193-94; *Deep Sea Research,* 102 F.3d at 387-88. Adding to the confusion is the Ninth Circuit's decision in *Yukon Recovery,* where the court was unsure whether the lack of technology should be considered one factor of many in proving abandonment, or whether it should operate as a complete bar to a finding of abandonment. *Id.* at 1189.

Applying a "clear and convincing" standard places a much greater burden on the states to prove that shipwrecks have been abandoned. The dissent in *Fairport III* explained:

> [A]lthough neither the statute nor its history addresses the standard of proof applicable to the abandonment showing, adopting a clear and convincing evidence standard over the more typical preponderance of the evidence standard would run counter to the expressed intention of Congress to place title to these abandoned shipwrecks in the hands of the states. Without clear direction to the contrary, I cannot endorse the adoption of the clear and convincing evidence standard.

177 F.3d at 502 (Moore, J., dissenting).

The Fourth Circuit's standard of abandonment will result in salvors and treasure hunters seeking out descendents of former owners, foreign governments, insurance companies or their successors who could arguably claim title to lost property, and attempting to obtain ownership rights in historic shipwrecks and their cargo. The effect will be to undermine state regulatory authority and uniformity in the treatment of historic shipwrecks throughout the nation.

CONCLUSION

The decision of the Fourth Circuit exacerbates the confusion and jurisdictional conflicts in the law governing historic shipwrecks, which Congress sought to correct in the ASA. This Court's review is necessary to resolve the conflict among the circuits and to enable the states to regulate abandoned shipwrecks as Congress intended. Thus, for the reasons discussed more fully above, *amici* respectfully request that the Petition for Writ of Certiorari be granted.

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APPENDIX

Interests of *Amici Curiae* Organizations

National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture," and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. The National Trust has grown to include more than 250,000 individual members and approximately 3,500 member organizations, as well as operating seven regional and field offices.

Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic resources throughout the United States. The National Trust has a particular interest in the protection of historic shipwrecks. The National Trust actively supported the passage of the Abandoned Shipwreck Act of 1987 and has participated as *amicus* in cases challenging and upholding its legality and effectiveness. The National Trust has participated in more than 130 federal and state court cases over the past quarter century and has participated as an *amicus* in 14 cases briefs before this Court.

Advisory Council on Underwater Archaeology

The Advisory Council on Underwater Archaeology ("ACUA") is an elected body of leaders in the field of underwater

archeology and is associated with the Society for Historical Archaeology. The purposes for which the ACUA is organized are to preserve and protect underwater archeological sites, to encourage maintenance of the highest ethical and research standards in underwater archeology, and to educate the general public and sport diving community about the need for conservation of underwater archeological resources. The ACUA encourages the publication of underwater archeological research and the distribution and dissemination of information concerning archeological matters. The organization also sponsors and with the Society for Historical Archaeology, publishes *Underwater Archaeology*.

Council of American Maritime Museums

The Council of American Maritime Museums ("CAMM") exists to uphold, promote and further the welfare, programs and activities of maritime museums in the Western hemisphere. To these ends, CAMM works to insure that high professional standards are adhered to in the preservation and interpretation of maritime history, collections, sites and vessels. CAMM also encourages cooperation between member museums in research and loan exhibits, jointly sponsors publications, and promotes public awareness of itself and the interests of its members. In addition, CAMM lobbies on legislation and government actions affecting its members.

National Conference of State Historic Preservation Officers

The National Conference of State Historic Preservation Officers ("NCSHPO") is a non-profit, professional organization representing the State Historic Preservation Officers in the 59 States, territories and the District of Columbia. The role of NCSHPO in the administration of the national historic preservation program was recognized in the 1980 amendments to the National Historic Preservation Act. 16 U.S.C. § 470.

NCSHPO encourages research and development concerning historic preservation programs, as well as legislative proposals for the implementation of programs at the state and federal levels. NCSHPO actively supported the passage of the Abandoned Shipwreck Act of 1987.

North American Society for Oceanic History

The North American Society for Oceanic History ("NASOH"), incorporated in 1974, is a not-for-profit organization whose members include curators of maritime museums and history professors across the U.S. and in Canada. The goals of the organization include the research and promotion of maritime history. NASOH sponsors a annual conference at which members present scholarly papers and the organization rewards outstanding publications on maritime history and nautical archaeology. For several years, NASOH has also worked on behalf of the preservation of historic shipwrecks.

Society for American Archaeology

The Society for American Archaeology (SAA) is an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 6500 members, the society represents professional, student, and avocational archaeologists in a variety of settings including government agencies, colleges and universities, museums, and the private sector. Since its inception in 1934, the SAA has endeavored to stimulate interest and research in American archaeology; advocate and aid in the conservation of archaeological resources; encourage public access to and appreciation of archaeology; oppose all looting of sites and the purchase and sale of looted archaeological materials; and serve as a bond among those interested in the archaeology of the Americas.

Society for Historical Archaeology

The Society for Historical Archaeology ("SHA") is the largest professional organization of scholars concerned with the terrestrial and underwater archaeology of the modern world (from A.D. 1400 to the present). SHA promotes scholarly research and the dissemination of knowledge concerning historical archaeology, specifically the identification, excavation, interpretation and preservation of sites and materials on land and underwater. The SAA annually sponsors the international Conference on Historical and Underwater Archaeology, publishes a professional journal of terrestrial and underwater research and publishes *Underwater Archaeology* with the assistance of the Advisory Council on Underwater Archaeology. The great significance of historic shipwrecks lead SHA to strongly support Congress's enactment of the Abandoned Shipwreck Act of 1987.

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No.99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

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Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION

ARGUMENT

1. The Circuit Conflict Over The Admiralty Law Standard For Abandonment Is Genuine And Substantial

Despite the fact that three different circuits, state courts and numerous legal scholars have recognized the fundamental conflict among the circuits regarding the admiralty law standard for abandonment, Respondents explain away the circuit conflict as a "fiction" manufactured by Petitioner. Respondents apparently propose that Petitioner's sway over the bench and bar is so mesmerizing that it has succeeded in beguiling not only a dozen different judges of various United States courts of appeals, but also the

Solicitor General of the United States; Attorney Generals for *amici curiae* states from West to East Coasts, from North to South; learned scholars and publications in law, archaeology and history in the U.S. and abroad; and even *amici* the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, the Society for American Archaeology, the National Association of Academies of Science, the Advisory Council on Underwater Archaeology, the North American Society for Oceanic History, the Society for Historical Archaeology, the Council of American Maritime Museums and the National Maritime Historical Society—all of whom have recognized the split among the circuits.

The division among the circuits is real and profound. Contrary to Respondents' assertion, the Ninth and Sixth Circuits, in addition to the Fourth Circuit,[1] have recognized the split. All told, twelve judges of the courts of appeals have implicitly or explicitly entreated the Court for guidance or otherwise recognized the circuit split, and not a single circuit or district judge has stated the contrary. Although Respondents protest that none of the cases recognizing the circuit split involved claims derived from an "owner," exactly the opposite is true.[2] The circuits are hopelessly split

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[1] Judge Widener is not, as Respondents suggest, the only judge in the Fourth Circuit who has identified the circuit split. Two other judges of that circuit joined in his unanimous opinion below. Moreover, five Fourth Circuit judges (including two of the original panel members) voted for rehearing en banc of the 1992 opinion on abandonment.

[2] *See Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379 (9th Cir. 1996) (claim by salvor purchasing rights from alleged subrogated insurance company); *Fairport International*

regarding the admiralty standard for abandonment, the definition of abandonment, the applicable burdens of proof and the role of technology.

2. The Issue Of The Admiralty Law Standard For Abandonment Is Neither Precluded By The Law Of The Case Doctrine Nor Moot

The "law of the case" doctrine has no application where, as here, an issue decided below is addressed to a higher authority. The Court's 1993 denial of certiorari on an interlocutory basis presents no bar now that a final judgment has been rendered in the dispute between Columbus-America and the insurance claimants. *See e.g. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58

Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al., 105 F.3d 1078 (6th Cir. 1997) (claim by salvor purchasing from purported original owner*); The People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E. 2d 141 (Ill. App. 1997), *rev'd*, 710 N.E.2d 820 (Ill. 1999) (claim by insurer and salvor claiming through insurer*); Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999) (claim by Spain).); *Columbus-America v. Atlantic Mutual, et al.*, 203 F.3d 291 (4th Cir. 2000) (claim by insurance companies asserting succession by subrogation.) (In quoting the Fourth Circuit's 1992 observation that, for an ancient shipwreck "a court may infer abandonment," Opp. Brief 2, Respondents omit the court of appeals' very next remark: "Such an inference would be improper, though, should a previous owner appear and assert his ownership interest...." Pet. App. 60a). *Cf. Yukon Recovery v. Ocean Mar, Inc., cert. pending* No. 99-1958 (claim by salvor claiming through insurer).

(1916).[3]

The doctrine of mootness also has no application to this ongoing *in rem* proceeding. In admiralty actions *in rem*, the entire world is a party to the proceeding, *California v. Deep Sea Research*, 523 U.S. 491, 118 S. Ct. 1464, 1470 (1998), *quoting United States v. Bright*, 24 F. Cas. 1232, 1236, No. 14,647 (CC Pa. 1809), and each time Columbus-America makes a recovery in the future, it will be required to adjudicate its rights in the recovery—including whether each item is "abandoned." Abandonment will be a recurrent issue in the proceeding for many years to come, see Pet. App. 21a, and accordingly is not moot. *See e.g. Carroll v. Resident and Commissioners of Princess Anne*, 393 U.S. 175, 178-79 (1968); *Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982); *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Even *arguendo* leaving aside the ongoing issue of title to future recoveries, and focusing solely on the "quarrel between Columbus-America and the Underwriters," the issue is not moot because abandonment goes to a core issue below—the remedy for the district court's amendment of the conditional settlement agreement. "Having found that...the district court erred in altering the parties' Settlement Agreement," the court of appeals was required to fashion a remedy for the amendment, Pet. App. 17a, 19a, 22a; by its express terms, such failure of a condition rendered the agreement itself "null, void and of no effect." Pet. App. 11a. On this issue, the crux of the decision below was that the absence of guidance on the standard for abandonment from a higher authority prevented the court of appeals from

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[3] Ironically, in 1993, the absence of a final judgment was the key ground interposed by Respondents as barring *certiorari* review of the Fourth Circuit's express abandonment rule.

accepting Columbus-America's proposed remedy for the amendment—a finding of abandonment of the past recoveries—and permitted only an alternative remedy. Pet. App. 28a. This Petition seeks such guidance from a higher authority, which would reverse the remedy granted below.

Respondents' reference to the "acceptance of benefits" doctrine[4] has no application to this or any other case where the adequacy of the amount of the judgment is at stake, where the appellant would be entitled to the "benefit" irrespective of the outcome of the appeal, or where the issue appealed differs from the issue determining the "benefit." *See U.S. v. Hougham*, 364 U.S. 310, 312 (1960); *Embry v. Palmer*, 107 U.S. 3, 8 (1882); *Reynes v. Dumont*, 130 U.S. 354, 394 (1889); *United States v. Dashiel*, 70 U.S. 689, 703 (1865).[5] Columbus-

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[4] In the proceedings below, Respondents initially argued the precise opposite of their current position, i.e. that, as a matter of law, Columbus-America's sale could not render the issues moot or otherwise oust the court's jurisdiction, Response to Columbus-America's Motion For Expedited Ruling on Appeal 5-8 (2/3/00), *citing Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 84-89 (1992), and the court of appeals agreed. Respondents then reversed their position, arguing unsuccessfully below that the sale had made the case moot. Respondents then switched back to their original position in a letter to Petitioner on June 20, 2000, stating that Respondents themselves "will be filing a cross-petition for *certiorari*." Respondents' claim of mootness in their Brief in Opposition simply reflects their latest flip-flop.

[5] In what is now hornbook law, state supreme and lower courts throughout the land are in accord with the Court's precedents rejecting the acceptance of benefits theory under these circumstances. *See generally* 5 Am Jur. 2d *Appellate Review* § 631 *et seq., and cases cited therein.*

America's right to 92.4% of the treasure was undisputed by the Underwriters in the proceeding below (they failed to perfect a cross-appeal, nor have they filed a cross-petition for *certiorari*), and Columbus-America received the salvage award in 1995 independently of its position on abandonment. Since that time, because of the Underwriters' failure to cross-appeal and contest that award, the only possible alternative outcome of further proceedings could be to increase Columbus-America's share of the treasure to 100%.

3. The Court's Action To Resolve The Circuit Conflict Is Important To The Efficacy Of The Abandoned Shipwreck Act, The Development Of Admiralty Law, And The Progress Of High Technology Maritime Exploration

Respondents mistakenly assume that federal and state stewardship of abandoned shipwrecks under the ASA is inconsistent with deep-sea exploration outside the territorial waters of the United States. The purpose of the Abandoned Shipwreck Act is not, as Respondents imply, to preclude exploration, but rather to ensure that exploration takes place in a responsible way. 43 U.S.C. § 2103. Entirely consistent with deep-sea exploration are the ASA's provisions for a cooperative effort among public and private sectors to explore and preserve our nation's underwater cultural heritage. *See id.* The only private explorations threatened by the ASA are the methods typically used by the Respondents, known as "smash and grab" salvage because of their practice of smashing into shipwrecks, indiscriminately grabbing for the valuables aboard with crude grabbing arms, and in the process destroying the scientific, historic and archaeological values of the shipwrecks. (Tr. 93 974-80) (former salvage manager for Respondents). The existing uncertainty over the admiralty law standard for abandonment provides no public benefit, and

favors only those who, through obfuscation, seek to advance their own interest at the expense of the public good. Resolution of the conflict among the circuits falls squarely within the Court's constitutional role in the development of the law maritime.

CONCLUSION

The Court should grant a writ of certiorari.

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Atlantic Mutual Insurance Company, *et al.* (hereinafter "Respondents" or "Underwriters"), respectfully submit this supplemental brief in answer to the Amici Curiae brief of the Attorneys General, submitted in support of the Petition for Certiorari.

ARGUMENT

I. THE ATTORNEYS GENERAL HAVE NO INTEREST IN THIS CASE AS ABANDONMENT IS NOT AN ISSUE AND THE ASA IS NOT INVOLVED

The brief of the Attorneys General advocates a different and novel definition of abandonment as this word is used in the Abandoned Shipwreck Act (43 U.S.C. § 2101 *et seq.*) ("ASA"). As noted at Page 11 of their brief, "The Shipwreck (S.S. CENTRAL AMERICA) is 160 miles from shore, well beyond the reach of the ASA." Since the S.S. CENTRAL AMERICA is not subject to the ASA, and the Attorneys General's brief relates to a new definition of abandonment of vessels under the ASA, the observations and comments of the Attorneys General are not applicable to the facts of this case.

This case involves a settlement by the parties whereby the salvage lien of the Petitioner was satisfied by a conveyance to it of title to a share (92.2 percent) of the salvaged treasure and the entry of a court order dismissing, with prejudice, all claims and issues in litigation. In reliance on the title received under the Settlement Agreement, and order, Petitioner sold its 92.2 percent share of the treasure.[1] Since the Petition seeks review of a decision rendered by the Fourth Circuit in 1992 which this Court declined to review, it is apparent that the Attorneys General were misinformed and they are unaware of the true status of this case.

Furthermore, abandonment will not be "a recurrent issue in this proceeding for many years to come" as suggested by Petitioner in page 4 of its reply brief, because all claims and

1. On June 20 and 21, 2000, the Respondents sold their 7.8 percent share of the treasure. As a result, no *res* exists at this time.

issues, including abandonment, have been settled and dismissed with prejudice by an order entered by the district court and reinstated by the Fourth Circuit. Contrary to the Petitioner's assertions, the Fourth Circuit was not asked to, it did not consider, it did not attempt to, nor was it required to, "fashion a remedy" in any way relating to the issue of abandonment. In the appeal to the Fourth Circuit the Petitioner requested that the court set aside and declare the settlement agreement null, void and of no effect and restore the parties to the status quo. It did not ask the court to fashion or provide any other remedy. Now that the Fourth Circuit has vacated the Order entered by the District Court on July 1, 1998, and confirmed the Settlement Agreement and reinstated the Dismissed Agreed Order of June 23, 1998, Petitioner is, for the first time, requesting this Court to reverse the Fourth Circuit's 1992 abandonment decision as a remedy for the District Court's *sua sponte* Amended Dismissed Agreed Order. If Petitioner prevails, the *sua sponte* action of the District Court will result in a reversal of the law of this case, a complete judicial repudiation of the Settlement Agreement, and a complete discharge of the Underwriters' claim to the salvaged gold. After twelve years of litigation, this is surely not the result the Attorneys General, or, this Court should endorse. Although the Fourth Circuit discussed the issue of abandonment, it was in the context of the effort of Petitioner to have the dissenting opinion in 974 F.2d 450 (4th Cir. 1992) adopted. The Fourth Circuit rejected this invitation to revisit and adopt the 1992 dissenting opinion and stated:

> We are of opinion that Columbus-America has been given all the protection it can be given consistent with due process and the previous opinion of this court in this case in 974 F.2d 450 (4th Cir. 1992) (Pet. App. 24a).

In affirming the validity of the Settlement Agreement and reinstating the dismissed with prejudice order, the Fourth Circuit did not, as petitioner contends, do so because it could not change its decision of 1992. The Court without any reference to the

issue of abandonment upheld the Settlement Agreement and reinstated the original Agreed Dismissal Order. Petitioner's contention that the Court of Appeals was prevented from accepting Petitioner's[2] proposed remedy for the amendment of the Settlement Agreement — a finding that the treasure was abandoned — is a complete misrepresentation of its own arguments and the rulings of the Fourth Circuit which held:

> Any argument that Columbus-America's counsel may have lacked authority to enter into the Settlement Agreement is without merit because the record clearly shows that Thompson, Columbus-America President, authorized its attorney to execute the contract of settlement at issue here . . . *Because the District Court's entry of the agreed dismissal order was correct, although for different reasons, we affirm entry of the order.* (Pet. App. 14a-15a) (Emphasis added).
>
> * * *
>
> Having found that the initial agreed dismissal order that effectuated the parties' Settlement Agreement was properly entered by the district court . . . we must now determine the disposition of this case. (Pet. App. 22a).

The Fourth Circuit then went on to reject Columbus-America's assertion that the Settlement Agreement could not

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2. Petitioner has contended that the denial of certiorari by the Supreme Court in 1993 was on the grounds that the lower court's decision was not a final judgment. This is a misrepresentation that is unsupported by any reference in the record or any decision. Interlocutory appeals in the Court of Appeals in an admiralty case is specifically allowed by 28 U.S.C. § 1292. The United States Supreme Court has jurisdiction to review any cases in the Court of Appeals. 28 U.S.C. § 1254. The effect of the United States Supreme Court refusing to grant certiorari is that the judgment or order is final and not subject to further review. *Patterson v. City of Newport News, Va.*, 364 F.2d 816 (4th Cir. 1966), *cert. denied*, 385 U.S. 650, *rehearing denied*, 386 U.S. 969 (1967).

be enforced and that the parties should be returned to the pre-settlement status.[3] (Pet. App. 22a-24a).

The court concluded:

> We thus, on remand, require the district court to re-enter its Dismissed Agreed order previously entered June 23, 1998. (Pet. App. 24a).

Not one word was said by the Court of Appeals to support Petitioner's statement in its reply brief at pages 4 and 5:

> On this issue, the crux of the decision below was that the absence of guidance on the standard for abandonment from a higher authority prevented the court of appeals from accepting Columbus-America's proposed remedy for the amendment — a finding of abandonment of the past recoveries — and permitted only as alternative remedy.

Furthermore, there is nothing in the record that lends credence to such a statement.

II. THERE IS NO SPLIT IN THE CIRCUITS ON THE ISSUE OF ABANDONMENT

Abandonment is a factual determination. *See People ex rel. Illinois Historic Preservation Agency v. Zych*, 186 Ill.2d 267, 710 N.E.2d 820 (Ill. 1999) where the court noted:

> In general, a finding of abandonment is considered a factual determination (*Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 (5th Cir. 1989); *Friedman v. United States*, 347 F.2d 697,704 (8th Cir. 1965)) . . .

186 Ill.2d at 278.

In *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *rehearing en banc*

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3. How that would be possible, given that Columbus-America had at this time sold the 92.2 percent share of the treasure title to which it received under the Settlement Agreement, was not stated by Columbus-America.

denied, cert. denied, 507 U.S. 1000 (1993), review of which is sought by the Petitioner, the Fourth Circuit held that the finding of abandonment by the district court was clearly erroneous and that there was no evidence to support such a determination stating:

> Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment.

974 F.2d at 464-465. (Pet. App. 60a, 66a).

This holding is consistent with the determinations made by every circuit court and state court that has considered and decided the issue of abandonment when a claim is asserted by an underwriter, or, under the rights of an underwriter or successor, as was made in this proceeding. *See Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000); *Deep Sea Research Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds, and remanded*, 523 U.S. 491 (1998); *People ex rel. Illinois Historic Preservation Agency v. Zych*, 186 Ill.2d 267, 710 N.E.2d 820 (Ill. 1999).

The cases cited by the Attorneys General at pages 5, 6, 7, 8, 9 and 10 of their brief to support the contention that there is a conflict between the circuits are not in point. The cases cited from the First, Third, Fifth and Eleventh Circuits all deal with suits in which no one appeared and asserted a claim of ownership in the salvage proceedings.[4] It is obvious that a vessel or its

4. In fact, very recent decisions in the Fifth and Eleventh Circuits, which involved claims by owners or those claiming rights of owners, cited favorably the Fourth Circuit's decision in this case (974 F.2d 450) as to the application of the law of salvage versus the law of finds. *See Adams v. Unione Mediterranea DiSicurta*, No. 98-30875, 2000 U.S. App. LEXIS 19808 (5th Cir. Aug. 14, 2000); *International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. July 17, 2000).

cargo is abandoned when, after publication by legal notice of the salvage, no one enters the proceedings and asserts a claim of ownership. To cite such cases to this Court and compare them to the determinations by circuit courts where owners have appeared, asserted and established ownership to create a "conflict" is disingenuous.

Judge Widener's comment in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291, 304, *rehearing denied* (4th Cir. 2000) set forth at footnote 24 of page 9 of the Attorneys General's brief to the effect that the United States Supreme Court, Sixth Circuit and the Ninth Circuit have rejected the Fourth Circuit's test of abandonment is inconsistent with the Sixth Circuit on remand from the Supreme Court in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999) where it held:

> We think that the apparent divergence of authority [between the Fourth and the Sixth and Ninth Circuits] *masks a degree of underlying agreement.* A close reading of the cases reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will. *To overcome this significant hurdle, the claimant may prove* abandonment by inference as well as by express deed. This proposition finds support even from those cases cited as examples of the doctrine of "express abandonment." See, e.g. Columbus-*America*, 974 F.2d at 464-65. ("Such abandonment must be proved by clear and convincing evidence, though, such an owner's express declaration abandoning title. Should the property encompass an ancient and longlost [sic] shipwreck, a court may infer an abandonment."); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

> ("While lapse of time and nonuser [sic] are not sufficient, in of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon."). Once these opinions recognize an exception to a rule of express abandonment, the question becomes after what length of years may a court infer abandonment, rather than draw arbitrary (time) lines separating express from implied tests, we choose to view length of time as one factor among several relevant to whether a court may infer abandonment.
>
> We agree that lapse of time, alone, does not necessarily establish abandonment, *see, e.g.*, *Wilkie*, 29 *F.Cas. at* 1247, and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, see part III.C. *infra*, may support a finding that an owner has abandoned a shipwreck.

177 F.3d at 499-500 (emphasis added).

> Proof by inference still requires proof, not conjecture — a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment.

Id. at 500.

This holding does not support the contention that a conflict exists between the Sixth and the Fourth Circuits on the issue of abandonment.

It is difficult to understand how Judge Widener can state that the Ninth Circuit has rejected the Fourth Circuit's test of abandonment when on the same page, he states:

> . . . the rule for finding abandonment is more stringent in this circuit [the Fourth] then in the Sixth

> Circuit and *may be the same* as the Ninth Circuit's rule in the *Brother Jonathan*.

203 F.3d at 304 (Pet. App. 28a) (emphasis added).[5]

Further, both of these cases relied on by Judge Widener, *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds*, 523 U.S. 491 (1998); and *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 105 F.3d 1078 (6th Cir. 1997), *aff'd on jurisdiction and reversed on all other grounds*, 523 U.S. 1091 (1998), were reversed and remanded by the Untied States Supreme Court on the issue of abandonment. The Supreme Court in the *Brother Jonathan* remanded these cases on that issue and specifically instructed the district court:

> There remains the issue whether the courts below properly concluded that the *Brother Jonathan* was not abandoned for purposes of the ASA. . . . Because the record before the Court is limited to the preliminary issues before the District Court, we decline to resolve whether the *Brother Jonathan* is abandoned within the meaning of the ASA. *We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under ASA conforms with its meaning under admiralty law.*

523 U.S. 508 (emphasis added).

It is misleading to cite these cases that were remanded on the issue of abandonment as support for the existence of a conflict in the circuits.

It is unfortunate that the Attorneys General repeat Judge

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5. Moreover, Judge Widener's 1992 dissent in this case (at 974 F.2d at 470) has little or no support in the Fourth Circuit as very recently a panel of the Fourth Circuit enthusiastically affirmed the 1992 majority opinion on abandonment. *See Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, Nos. 99-2035, 2036, 2000 U.S. App. LEXIS 17546 (4th Cir. July 21, 2000).

Widener's inaccurate and misleading recitation of the history of the *Brother Jonathan* and the *Captain Lawrence* cases by stating with respect to the abandonment issue that each case was "aff'd in part and vacated in part on other grounds." As the above quote from the Supreme Court in the *Brother Jonathan* clearly states, the cases were remanded for the district court to make a determination on abandonment with the clarification that the meaning of "abandoned" under the ASA conforms "with its meaning under admiralty law."

All of the courts that have considered the question of abandonment where an owner, or those claiming such ownership, have appeared, asserted and proved ownership, have resolved the issue of abandonment by applying the traditional law of admiralty, and, in so doing, have concluded that while abandonment can be inferred in appropriate situations it must be proved by clear and convincing evidence. No circuit court has held that the mere passage of time is enough, by itself, to establish an abandonment. Abandonment is a factual issue and there is no conflict in the findings of the Circuit Courts of Appeals on this issue.

III. THE ABSENCE OF SALVAGE TECHNOLOGY ARGUES AGAINST ABANDONMENT

The Attorneys General argue that the absence of technology at the time a loss occurs should support a finding of abandonment. The apparent rationale for this unique insight is that if the ability to salvage lost property was not in existence at the time the property was involuntarily taken from the owner's control, the owner must have given up all hope of retrieving it, and hence, the goods must have been abandoned. Such reasoning makes abandonment dependent upon the psychological state of the owner. Whereas, abandonment is a deliberate intentional act, established by either express denunciation of ownership, or, it is to be inferred from the totality of the facts. The property owner's depression or optimism over his opportunity or chances to recover his property is not the determinant.

One shudders to think of the effect such a holding will have on the ownership of stolen property. Only a small portion of stolen property is ever recovered. Certainly a resident of New York City has little or no hope that property stolen from him will be returned. Yet some stolen property is found.[6] Is all such property now to be considered abandoned? Abandonment occurs when a person makes a conscious decision that he will no longer assert ownership over the lost property. This occurs when he expressly so states or demonstrates that even though the property is available, he does nothing to reduce it to his possession after the passage of a considerable period of time. Abandonment does not occur because the technology does, or does not, exist to recover the lost property at the exact time it is involuntarily taken from his possession.

It makes as much sense to say that if at the time of loss the technology to salvage a shipwreck exists is evidence that an abandonment did not occur, as to state that the lack of the same technology is evidence that an abandonment did occur.

CONCLUSION

It is apparent that the Attorneys General were uninformed or they were misled as to the facts and proceedings in this litigation and that the Fourth Circuit was not asked to "fashion a remedy" relating to abandonment. Furthermore, the Attorneys General did not realize that this case was settled and that Petitioner received title to a portion of the treasure under the Settlement Agreement which it affirmed by selling its share of the treasure.

The efforts to create a "conflict" between Circuit Courts of Appeal by citing to cases that were reversed by this Court and cases where no owner appeared and claimed ownership comes with little grace. Since the citing of such cases to create a "conflict" with circuits that have decided cases where an owner has appeared and established ownership is misleading, no effect should be given to the Attorneys General brief and the Petition for a Writ or Certiorari should be denied.

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6. A considerable amount but only a tiny fraction of the amount stolen.

Respectfully submitted,

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No.99-1935

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

COLUMBUS-AMERICA DISCOVERY GROUP, INC.
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL AUTHORITIES IN SUPPORT OF PETITION FOR CERTIORARI

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SUPPLEMENTAL AUTHORITIES IN SUPPORT OF PETITION FOR CERTIORARI

Since the date of the last filing in this case, three additional courts of appeals have issued decisions on the admiralty law standard for abandonment. Pursuant to Rule 15.8, Petitioner Columbus-America respectfully notes the following cases:

- *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels,* 2000 WL 1015814 (4th Cir. July 21, 2000), Slip Op. at 15 (admiralty law standard for abandonment requires proof of "an express abandonment by 'clear and

convincing evidence,'" *citing Columbus-America*, 974 F.2d at 464).

- *International Aircraft Recovery, L.L.C. v. Unidentified Wrecked and Abandoned,* 2000 WL 977396, Slip Op. at 6 (11th Cir. July 17, 2000) (admiralty law presumes non-abandonment).

- *Adams et al. v. Unione Mediterranea, et al.,* 2000 WL 1041233, Slip Op. at 12 (5th Cir. Aug. 14, 2000) (admiralty law standard for abandonment of merchant vessels may require proof of express abandonment) (*semble*).[1]

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[1] *See also Yukon Recovery v. Ocean Mar, cert. pending* No. 99-1958.